CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT OPELOUSAS,

IN

JULY, 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

HON. FÉLIX P. POCHÉ,
HON. ROBERT B. TODD,
HON. CHARLES E. FENNER,*
HON. LYNN B. WATKINS,
} *Associate Justices.*

THE STATE OF LOUISIANA VS. ABRAHAM LEWIS, *alias* NISH OR SNOOT.

Criminal courts have no authority to examine members of the grand jury as witnesses concerning proceedings which may have taken place in their room or during their deliberations.

There is no law which prescribes the *quantum* of evidence on which grand juries must rest their conclusions in returning indictments.

Their findings amount at most to accusations, and in their conclusions they are beyond the control of the courts.

APPEAL from the Twenty-sixth District Court, Parish of St. John the Baptist. *Rost*, J.

G. Leche, District Attorney, *H. N. Gautier* and *John M. Ogden* for the State, Appellee.

Chas. A. Baquié, for Defendant and Appellant:

1. Where an indiciment is laid before the grand jury without any names of witnesses being indorsed thereon, with the coroner's inquest and the testimony taken thereat, and the grand jury, without summoning, swearing or examining any witnesses in the case.

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finds a true bill against the accused upon the testimony taken before the coroner, the indictment will be quashed as being found on illegal and insufficient proof. 14 Ann. 461; Archbold's P. and P., vol. I, pp. 98 *et seq.* and foot notes.

2. Such irregularities may be urged in a motion to quash, and competent evidence should be heard in support of the motion.
3. In the absence of any count or averment to that effect in the indictment, the State should not be allowed to prove that the accused was a fugitive from justice when arrested, thereby illegally creating a presumption of guilt against him. 36 Ann., State. vs. Victor.
4. The general presumption of guilt resulting from flight does not arise when the crime has been committed in the presence of witnesses who testify at the trial. 37 Ann. 77, State vs. Melton.
5. The accused has a constitutional right of being heard by his counsel and to present his defense to the court and jury, and any abridgment of that right is repugnant to the principle of charity and liberality which characterizes the criminal law towards accused persons.

The opinion of the Court was delivered by

POCHÉ, J. The defendant seeks relief from a conviction of murder without capital punishment, and he relies on two bills of exception:

1st. He charges error in the disposition made by the trial judge of his motion to quash the indictment. His ground was that the finding of the grand jury was not supported by sufficient evidence, but that it rested exclusively on the testimony taken at the coroner's inquest. The judge properly refused to hear evidence in support of the charge of alleged misconduct of the grand jury.

There was no defect of form or of substance apparent on the face of the indictment, and none was even alleged, and hence the motion to quash contained no elements which must form the basis of such a motion.

The finding of the grand jury is not a verdict or judgment; it amounts, at most, to an accusation; and we know of no law which fixes the nature or *quantum* of the evidence on which the grand jury must rest their conclusions.

The law which exacts of members of the grand jury a solemn oath not to disclose the proceedings which take place in the grand jury room can surely not be invoked to open the lips of these same members in order to give testimony concerning the very proceedings which they have promised under the sanctity of an oath to keep secret. If, therefore, the inquiry suggested by defendant's complaint could in the least be sanctioned by law, the investigation would be paralyzed by reason of the utter absence of all means to render it effective.

But in law as well as in reason there is no more authority to justify an inquiry into the nature of the evidence which the grand jury has considered in finding a true bill than there would be to require the

District Attorney to disclose or detail the sources of knowledge on which he bases his information in cases where that proceeding is sanctioned by law. State vs. Jones, 8 Rob. 617; State vs. Bunger, 14 Ann. 461.

2d. The second complaint charges error in allowing the officer who had arrested the accused to answer the question, "when and where was the accused arrested?"

The ground is that the intention of the State was to show that the accused had fled from justice, without any averment to that effect in the indictment.

Nothing in the question or in the record shows that such was the intention of the District Attorney.

And if the question had drawn from the witness an answer showing the fact, the objection would go to the effect, and not to the admissibility of the evidence.

We find no error to the prejudice of the accused.

Judgment affirmed.

No. 1265.

THE STATE OF LOUISIANA VS. VERNON HENDRICKS.

An indictment is not amenable to duplicity, because it charges one or more acts contemporaneously, germane in character, and altogether making one offense, although each of said acts constitutes in itself a minor offense of the same genus with the graver one charged.

A verdict of guilty of shooting with intent to kill is not responsive to the charge of shooting with intent to murder, nor does it meet any offence denounced by any statute of the State.

Where the indictment is good but the verdict returned is unwarranted and illegal, and is, therefore, annulled and set aside, the accused is thereby not entitled to his discharge, but can be tried again under the same indictment.

APPEAL from the Twelfth District Court, Parish of Avoyelles. *Blackman*, J.

M. J. Cunningham, Attorney General; *John C. Wickliffe* and *John N. Ogden*, District Attorneys.

Cullom & Coco for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was charged by indictment as follows:

"That Vernon Hendricks * * * did wilfully, feloniously and maliciously make an assault with a dangerous weapon in and upon one Thomas Williams, * * * and did then and there shoot,

wound and ill-treat him, the said Williams, with intent him, the said Williams, then and there, to kill and murder," etc.

Under this indictment a trial was had, and the jury returned the following verdict: "We, the jury, find him guilty with an assault with a dangerous weapon, and with shooting with intent to kill."

Thereupon a motion in arrest of judgment was filed, substantially to the effect that the indictment charges, in one count, three separate and distinct offenses, viz: those provided by sections 792, 793 and 794 of the Revised Statutes, and was, therefore, amenable to the charge of duplicity; and, further, that the verdict was not in conformity to, or did not find, any offense known to the laws of Louisiana.

It is true, as charged, that the acts recited in the indictment do constitute one or more offenses recognized by the laws of the State. These acts are, however, of a kindred character, were contemporaneous, were parts of the same affair, and, in point of fact, led up to and culminated in the grave offense charged, which evidently at once constitutes the subject of the prosecution, and that is, substantially, shooting with intent to murder. Sec. 791, R. S.

It is certain that, as a general rule, the inclusion in one count of two separate and distinct offenses is duplicity, and fatal to an indictment, but where the acts charged, even though of themselves each a minor offense, are germane to each other and to the main charge, and taken altogether constitute but one affair and make one offense, it is uniformly held, in letter and spirit, to be out of this general rule, and not, in fact, amenable to the charge of duplicity. 2 vol. Bishop Crim. Pro. 191, 192; 33 Ann. 182, Habe vs. Collins.

There is nothing, therefore, wrong about the indictment; at least, nothing that condemns it as invalid, although inartistically and carelessly drawn; but when we come to consider the verdict, we meet with more difficulty. As stated, it finds the accused guilty, not of shooting with intent to murder, as charged in the indictment, but guilty of shooting with intent to kill, which it is clear is not responsive to the charge, nor does it meet or respond to any other or lesser offense of the same general or, indeed, of any kind prescribed or denounced by any statute or law of the State.

We shall, therefore, be compelled to sustain the second point embraced in the assignment of the counsel, and set aside the verdict, for the cause mentioned.

This will not have the effect of discharging the defendant, but under authority of the State vs. Olivier, recently decided at Monroe,

and not yet reported, supported by the precedents therein cited, the conclusion reached necessitates another trial under the same indictment. State vs. Foster, 36 Ann. 857; State vs. Burden, 38 Ann.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, so far as it quashes the indictment, be annulled, avoided and reversed, and the case be remanded, to be proceeded with accordiug to law and the views herein expressed.

No. 1259.

THE STATE OF LOUISIANA VS. MOSES WIRE.

1. A motion for new trial that is unaccompanied by any bill of exceptions, or evidence touching the errors complained of, will not be examined.
2. Unless the record discloses a bill of exceptions, motion in arrest of judgment, proper assignment of error, or error apparent on its face, the judgment will be affirmed.

APPEAL from the Twenty-sixth District Court, Parish of St. John the Baptist. *Rost*, J.

G. Leche, District Attorney, and *Chas. A. Baquié*, for the State, Appellee:

It has been repeatedly decided that the jury are the sole judges of the facts adduced in the course of a criminal trial, and that they have the right to disregard certain facts as being untrue, and receive other as being true. 18 Ann. 35; 35 Ann. 573; 20 Ann. 402; 8 R. 540.

It has also been repeatedly decided by this Court that it has nothing to do with the facts in such proceedings, and will not weigh them. 28 Ann. 236; 23 Ann. 129; 30 Ann. 132; Const. 1879, art. 81.

And also that this Court will not interfere with the discretion of the lower court in refusing a new trial, unless there is error patent of record. 28 Ann. 402; 36 Ann. 341; 32 Ann. 842; 33 Ann. 679.

Therefore we submit that the judgment of the lower court should be affirmed.

James D. Augustin for Defendant and Appellant:

In the interest of justice the Supreme Court will sometimes grant a new trial in a criminal case, when no precedent for it exists. State vs. Gunter, 30 Ann. 536.

The charge of the lower court and the facts urged as grounds for a new trial, can be brought before this Court in no other way than by bills of exception. *Ibid* 536, 539.

The counsel appointed by the court to defend the accused is entitled to a reasonable time, to be regulated by the judge, for preparation. 16 Ann. 425, State vs. Ferris; State vs. Shonhausen, 26 Ann. 422.

The affidavit of the accused for a continuance cannot be contradicted; it must be taken as true. 30 Ann. 296, State vs. Simien.

Favoring the liberty of the citizen, the Supreme Court will entertain the appeal, although there was no motion to quash, no bill of exception, no motion in arrest of judgment, nor formal assignment of errors. 23 Ann. 433, State vs. Forrest.

We make part of our syllabus the humane views and liberal interpretation of the law in favor of the life and liberty of the citizen so pointedly expressed by the court in 30 Ann. p. 540, State vs. Gunter. His Honor, Justice Manning, was then Chief Justice, and that

eminent jurist, Hon. R. H. Marr and Hons. Alcibiade DeBlanc and W. B. Spencer, Associate Justices; Hon. H. N. Ogden, was Attorney General, and Robert & Hunter, for defendant. That experienced criminal lawyer, as organ of the court, Justice Egan—the Court say: "While, however, we have applied the principles of well settled law to the various matters revised and discussed by us in detail, on the whole case, we are not left without an impression of the possibility that there may have been irregularities calculated to influence the result of the trial unfavorably to the accused, and that his counsel may have mistaken the manner of presenting them for the consideration of this Court as therefore less injury would be done to the State by our granting another trial than, possibly to the accused by refusing it, and as this Court has held new trials may sometimes be granted though no precedent exist for them, it is ordered that the verdict and sentence appealed from be, and they are, hereby avoided and set aside, and the case remanded to be proceeded with according to law."

The opinion of the court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of rape, and from a sentence to lifetime imprisonment in the penitentiary, in pursuance of the verdict of the jury, has prosecuted this appeal, which is predicated upon an alleged error of the trial judge in refusing to grant him a new trial, as prayed for.

The application for the new trial was not supported by any evidence, and no bill of exceptions was reserved for the accused, to the ruling complained of, and, even in the brief of defendant's counsel there is no suggestion of any error apparent upon the face of the record, which would fatally affect the proceedings.

However much we may be disposed to favor the liberty of the citizen by entertaining appeals when the proper defense of the accused has suffered through neglect, or mismanagement of counsel, we will restrict that disposition to extreme cases, unless the record discloses error apparent, a bill of exceptions, motion in arrest of judgment, or proper assignment of error. 38 Ann. State vs. Balize; 40 S. 190; 7 N. S. 234; 40 S. 658; 5 N. S. 341.

Neither of those conditions exist in this case.

This court has repeatedly and recently held that it cannot take notice of any facts adduced during the trial of a criminal case, pertaining to rulings of the judge, unless same accompanies a bill of exceptions, reserved at the time such ruling was made. 35 Ann. 742, State vs. Williams; 32 Ann. 842, State vs. Nelson; 35 Ann. 823, State vs. Belden; 35 Ann. 769, State vs. Jackson.

The counsel for the defendant has filed in this court what he styles an assignment of errors, and which is to the effect, that "all the *facts* stated in his brief as to the refusal of the judge *a quo* to allow a bill of exceptions to be drawn up * * * * and as to the statement of the prosecuting witness," etc.; and further to the effect that the judge

stated from the bench "that counsel might do so, but that he would not sign" such a bill of exceptions—but such errors cannot be presented in this manner. 35 Ann. 770, State vs. Riculfi and McClung; 90 S. 275, Wallace vs. Thompson. They are certainly not apparent upon the face of the record, and on this form of procedure we cannot grant the requested ruling.

The judgment is therefore affirmed.

No. 1261.

THE STATE OF LOUISIANA VS CHARLES JOHNSON.

The State is not entitled to prove, in support of a charge of burglary of a house, and the larceny of a pocket-knife therein by the accused, another burglary at a different time and place and the larceny of a gold watch, to interpret the intent of the accused, in the commission of the former.

APPEAL from the Twentieth District Court, Parish of Lafourche. *Beattie*, J.

E. A. O'Sullivan and *John N. Ogden*, District Attorneys for the State, Appellee.

John S. Billiu, for Defendant and Appellant:

The opinion of the court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of burglary and larceny, committed in the nighttime of the 23d of January, 1886, and from a sentence by the court, to fourteen years imprisonment in the penitentiary, in pursuance of the verdict of the jury, has appealed.

The indictment charges, in substance, that the accused and Nathan Taylor, "on the 23d of January, 1886, in the nighttime the dwelling house of Joseph O. Toups * * feloniously and burglariously did break and enter, with intent the goods and chattels of the said Joseph O. Toups, in the said dwelling-house, feloniously and burglariously to steal, take and carry away; and the said Charles Johnson and Nathan Taylor, one pocket-knife, of the value of ten dollars, the property of said Joseph O. Toups, in the said dwelling-house, there being found, there feloniously and burglariously did steal, take and carry away."

The record contains a bill of exceptions retained for the accused to the evidence of Charles Smith, witness for the State, to the effect that the accused Charles Johnson had told him that he had committed *an-*

other burglary at another time and place, and that in the later burglary he had taken a *gold watch*, and that said watch was then offered in evidence by the State; and thereupon counsel for the accused objected to the testimony, and the admission on the ground that same was irrelevant to the issue, and not pertinent to crime charged.

The judge *a quo* appends to the bill the following statement of facts, viz: "A witness was on the stand who was detailing a confession the accused. The confession related to *other* burglaries and thefts committed *about* the same time. The witness stated that accused stated he had stolen a *gold watch*; whereupon the District Attorney showed the gold watch, and asked if that was the one which witness said was like one described.

"The evidence was admitted to show *intent* of the accused in breaking and entering, and the court thought it be (the means) by which to test the truth or falsity of the witness's statements as to the alleged burglary. The jury was charged that accused could only be found guilty of the offense charged in the indictment, viz: the burglary of the house of Toups, and if the verdict was of larceny, then only of the larceny of the knife. But the court charged that the jury might judge of the intent of the accused, if they found the breaking and entering from *all the circumstances of the case*, as proven."

The judge erroneously overruled the objections of the counsel for the accused, to the reception of this testimony on part of the State.

It is difficult to conceive in what way the commission of a burglary, at a *different time* and place from that charged in the indictment, by the accused, could interpret the latter; or in what way the *subsequent* larceny, by the accused, of a *gold watch*, from a person not named, could interpret the previous larceny of a pocket-knife, the property of Joseph O. Toups. It was not proper to allow such evidence to be heard by jury, and the instructions of the trial judge were improper.

Such evidence could not affect the credibility of the accused because he was not a witness, and the truth or falsity of his statement was in no way involved.

The accused had not, upon his own motion, put his character in proof, and the State could not do so otherwise. The witness in question was suffered to testify as to matters that were wholly irrelevant to the main issue on trial—the guilt or innocence of the accused—and totally disconnected with the charge contained in the indictment. 33 Ann. 737, State vs. Gregory.

It is therefore ordered, adjudged and decreed that the verdict of the jury and sentence by the court be annulled, avoided and reversed, and that the cause by remanded and reinstated for further proceedings according to law.

No. 1262.

THE STATE OF LOUISIANA VS. CHARLES JOHNSON.

Same principle as in preceding case.

APPEAL from the Twentieth District Court, Parish of Lafourche. *Beattie*, J.

E. A. O'Sullivan and *John N. Ogden* District Attorneys, for the State, Appellee.

J. S. Billiu for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of burglary and larceny, committed in the night time of the 24th of January, 1886, and from a sentence by the court to fourteen years' imprisonment in the penitentiary, in pursuance of the verdict of the jury, has appealed.

The indictment charges, in substance, that Charles Johnson and Nathan Taylor did, on the 24th of January, 1886, feloniously break and enter, in the night-time, the dwelling-house of Cyprien Guidrey, and therefrom did take, steal and carry away one gold watch, of the value of twenty-four dollars, the property of one Henry Guidrey, therein being found at the time.

Under circumstances quite similar to those recited in the case No. 1261—same parties—the trial judge permitted the State to prove, by Joseph Toups, a state of facts indicating that the accused had, at a different time and place, stolen from him a cooked turkey, under similar instructions to those he had given in the case last cited.

For the reasons assigned in that case—State of Louisiana vs. Charles Johnson, No. 1261—it is ordered, adjudged and decreed that the verdict of the jury and sentence of the court be annulled, avoided and reversed; and that the cause be remanded and reinstated for further proceedings according to law.

No. 1264.

THE STATE OF LOUISIANA VS. ANDERSON HEYWOOD.

Article 29 of the Constitution, which provides that every law of the General Assembly must embrace but one object, and must express the same in the title, is mandatory, and any enactment which violates it is null.

Act No. 64 of 1884, entitled, "An act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications of malicious publications, or resorting to malicious acts, or threats of injury to person, reputation or property, though no valuable thing be demanded, or sought to be extorted," embraces at least four separate objects, and is, therefore, unconstitutional, null and void.

APPEAL from the Twelfth District Court, Parish of Avoyelles. *Barbin*, J.

M. J. Cunningham, Attorney General; *John C. Wickliffe* and *John N. Ogden*, District Attorneys, for the State, Appellee.

Cullom & Son and *A. V. Coco* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The State has appealed from a judgment quashing an indictment against the defendant, brought under act No. 64 of 1884 entitled, "An act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications, or malicious publications, or resorting to malicious acts or threats of injury to person, reputation or property, though no valuable thing be demanded or sought to be extorted."

The ground of the motion to quash is that the act in question is unconstitutional, being violative of article 29 of the Constitution of the State of Louisiana.

That article reads as follows:

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title."

A similar provision had been incorporated in previous Constitutions of this State, and was at different times subjected to judicial test; and it has been uniformly held that the provision was mandatory in its scope and character, and that a violation of its requirements would entail nullity on any act of the Legislature. Walker vs. Caldwell, 4 Ann. 297; State vs. Hackett, 5 Ann. 93; State vs. Harrison, 11 Ann. 722; State vs. Adeline, Ib. 736; Duvergé vs. Salter, 5 Ann. 94.

The following is the text of the act under consideration:

"SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That if any person shall, knowingly and maliciously, send or deliver, or cause to be sent or delivered, or cause to be received by another, any letter, postal card, written or printed matter, threatening to accuse him or her, or to cause or procure him or her to be accused of any fault, crime, offense or misdemeanor, or to charge, or cause or procure him or her to be charged, with any fault, misfortune, infirmity or failing, or to publish or make known any of his or her faults, misfortunes, infirmities or failings, or to injure or impair his or her good name, or reputation, or credit, or in any manner to cause him or her to be, or become subjected to, or liable to any public scandal, or public ridicule, or to subject him or her to any scandalous notoriety, or to any bodily harm, or if any person shall maliciously follow, or pursue, or intrude himself or herself upon another, at his or her home, place of abode, or residence, or at or in his or her place of business, office, or at any place of business or office where he or she may be engaged or employed, or on any public street or highway, or in any public place or place of public assembly whatsoever, against his or her will and consent, or shall in any manner, or by any means, maliciously threaten to wound, maim, kill, murder or inflict bodily harm on another, or shall maliciously threaten to burn, or destroy, or damage his or her building or other property, with malicious intent, though no money, goods or valuable thing be demanded, shall, on conviction, be imprisoned, with or without hard labor, not less than six months nor more than three years, and fined not less than fifty dollars nor more than five hundred dollars.

"SECTION 2. *Be it further enacted, etc.*, That this act shall take effect and be in force from the date of its promulgation."

As a sample of obscure composition, it can successfully challenge comparison with any legislative enactment that has been submitted to judicial investigation before this Court; and it has taken us many readings and deep study of its language before we could detect any definite object, as expressed in the title or contained in the body of the act.

But after a trying and patient examination, we have found, or at least we think we have discovered, in the body of the act, that provision is therein made for four separate objects, and that the objects contemplated are not all expressed in the title.

1st. The first object suggested by the inartistic language of the act is to provide for the punishment of threats of accusations or of injurious publications communicated by means of letters or other writings.

2d. The second is a provision for the punishment of the offense of maliciously following, or pursuing, or intruding on, another person, either in public or in private, against his or her will or consent.

3d. The third contemplates a penalty for making, in any manner, malicious threats to do almost any imaginable bodily harm on another.

4th. The fourth intention is to punish the offense of threatening to maliciously burn, or otherwise destroy or damage the building or other property of another. The proposition to punish an offender for sending threatening letters, contemplates an offense as distant from that of maliciously following another person as murder is from arson or burglary; it is also distinct from a threat to do bodily harm to another person, and it is not at all similar or kindred in its essence to that of threatening to burn or destroy the building or other property of another person. And, on inspection, it appears that the three other offenses denounced in the statute are essentially different and distinct from each other, and that each forms a separate subject or object of legislative enactment.

The reasons for such a constitutional provision as that now under discussion, have been considered by this Court in the opinions hereinabove cited, and need not here be repeated.

But the present statute, in the attempt of its framer to provide in one act for the punishment for threats of committing nearly all of the offenses denounced in our Revised Statutes, under the headings of offenses against persons and against property, would be strongly suggestive of the necessity of such a provision, if the same had not been inserted in the Constitution. We conclude that the statute is glaringly unconstitutional, and that it is nought but a dead-letter in the statutes of the State.

Judgment affirmed.

MRS. DORA LAMBETH, WIFE, ETC., VS. G. W. SENTELL ET ALS., AND THE SHERIFF.

The Supreme Court will take judicial cognizance of its own judgments in the trial of causes involving executions predicated thereon.

In executions under writs of *fi. fa.*, excessive seizure is not a legal ground of injunction of the execution; the remedy is to apply for reduction of seizure under art. 642, Code of Practice.

The seized debtor has not the right to point out property to be seized when the creditor who prosecutes the execution of the judgment has a privilege or mortgage on the debtor's property.

Lambeth vs. Sentell et als.

The seizure of immovable property is not invalidated by the failure to serve notice of seizure on the tenants. Pipkin vs. Sheriff, 36 Ann. 782, affirmed.

Parties who abuse the writ of injunction to stay execution of moneyed judgments against them should be mulcted in damages.

APPEAL from the Twelfth District Court, Parish of Avoyelles. *Blackman*, J.

E. T. Merrick and *A. V. Coco*, for Plaintiff and Appellant.

Thorpe & Peterman for Defendants and Appellees:

1. Excessive seizure is no ground of injunction against *fieri facias*. Bagley vs. Tate, 10 R. 45; Powell vs. Hayes, 31 Ann. 789; Burgess vs. Gordy, 32 Ann. 1297; Gusman vs. DePoret, 33 Ann. 333.
2. Seizure of rented immovable property under *fieri facias* need not be accompanied by notice to tenants. Carroll vs. Chaffe, 35 Ann. 83; Pipkin vs. The Sheriff, 36 Ann. 782.
3. When the creditor has special mortgage upon a part of his debtor's property, he may seize the mortgaged portion under the usual form of *fieri facias*, without, specifically, describing the same in the body of the writ. Dunlap vs. Sims, 2 Ann. 239.
4. Where the creditor, having special mortgage upon a part of the debtor's property proceeds by *fieri facias* against that part, the debtor has not the right to point out other property to be seized by the sheriff. C. P. arts 646 648.

The opinion of the court was delivered by

POCHÉ, J. This appeal is prosecuted by plaintiff from a judgment dissolving an injunction taken to arrest the execution of a judgment held by the defendant Sentell, with two per cent per annum interest on the amount of the judgment enjoined and damages in the sum of one hundred and fifty dollars *in solido* against herself and her sureties on the injunction bond. The grounds of her injunction were in substance as follows:

1st. That the amount of property seized was excessive, and that in an execution not resting on a special mortgage, she was denied the legal right to point out to the sheriff the property which she desired to be seized and sold first.

2d. That the sheriff could not seize any immovable property until he had commenced by seizing movable property.

3d. That there was no actual or legal seizure of the property for the reason of the sheriff's failure to have notified the tenants on the immovable property.

4. That the seizing creditor had caused to be reinscribed a mort gage intended to secure a sum of $4400, which has long since been paid, the intention of the seizing creditor being thereby to swell the amount of his claim with a view to destroy competition at the sale, and to thus obtain the seized property at a sacrifice.

The motion to dissolve the injunction was predicated on the ground that plaintiff's petition disclosed no cause of action.

I.

The error of law and of fact which plaintiff has fallen into as to the true character of the claim sought to be transferred against her has doubtless prompted the first ground of her injunction, and it has pervaded throughout the whole case, from the pleadings to the argument of her counsel on appeal.

Having alleged in her petition that the judgment in execution did not import or involve a special mortgage, she resisted, on trial, the introduction of any evidence, including the mandate of this court affirming the judgment enjoined, and the original petition. To an adverse ruling of the court a bill of exception was reserved and is pressed on our attention.

That evidence was utterly unnecessary, and for two reasons:

1st. This court has the undoubted right to take judicial cognizance of its own judgments and decrees, especially in an injunction intended to affect any of its mandates. Minor vs. Stone, 1 Ann. 283; Carroll vs. Chaffe, 35 Ann. 83.

Now the writ of *fi. fa.* herein enjoined and annexed to plaintiff's petition informs us that it was issued in execution of a judgment of the District Court of Avoyelles, rendered in the case of G. W. Sentell et als. vs. Dora Lambeth, wife of T. O. Stark, the identical parties herein, and turning to our reports in the 37th Annual, page 679, we find that the judgment was brought on appeal to this Court last July, and that our decree affirmed it, with recognition of the special mortgage claimed by the creditors in their original petition.

2. But in the zeal of counsel they seem to have lost sight of their own pleadings, for their own petition contains the same information.

After describing the identical suit which we had disposed of on appeal, and reciting that the judgment therein rendered was for the sum of $8,000 with interest of eight per cent per annum from March 3, 1875, plaintiff's petition contains the following averment:

"She shows that, in the act of mortgage executed May 5, 1875, your petitioner granted a mortgage on her property in addition to *the eight thousand dollars* (the italics are ours) for the sum of $4,400 as security for that sum for her sister," * * * and by the brief of one of her counsel, we are informed that that mortgage covered *all of her property.*

It is thus demonstrated that the claim in execution was secured by special mortgage; and that therefore the rights of the seized debtor are to be controlled by art. 648 and not by art. 646 of the Code of Practice, as contended for by her counsel.

Art. 648 reads: "The debtor shall not have the right of pointing out to the sheriff the property which he wishes him to seize when the debtor who prosecutes the execution of the judgment has a privilege or mortgage on part of his property," * * *

The fact that this article is found under the heading of the execution of judgments, and that the provision applies in terms to the "execution of a judgment" is a sufficient answer to the fallacious argument of plaintiff's counsel that the right of the debtor to point out property for seizure, is unexceptionally secured in all executions *via ordinaria*.

We therefore conclude and hold that, in this case, the seized debtor could not claim the right of pointing out property.

We note in this connection a point made by one of plaintiff's counsel in his brief, but not included in the pleadings, which is made to rest on art. 650, Code of Practice, which provides:

"Nevertheless, the debtor whose land shall have been seized, shall always be entitled to demand that a portion only, which he shall designate, shall be sold, if that portion is sufficient to satisfy the judgment, but if it be insufficient, a sale of the other portions shall be made." The name of the counsel who makes this point is not appended to the petition, with which he is apparently not familiar. Hence, he has fallen into the error of supposing that that ground had been adopted by his associate. In this, however, he is mistaken. But be that as it may, there is no force in the contention, and it is, to say the least, entirely premature, for the record does not show that the seized debtor has as yet made any demand touching the mode of effecting the sale. From the text of the article it appears that the remedy which it contemplates, has no reference to the seizure, which is the only bone of contention contained in the record.

As to the alleged excessive seizure the record shows that, as soon as complaint thereof was made, the sheriff was ordered to release all but the property specially mortgaged, and that the same has been so released. But the real answer to that complaint is to be found in arts. 652 and 653 of the Code of Practice, which point out the only and the exclusive remedy of the seized debtor in such an emergency. It is no longer an open question in our jurisprudence that such a complaint is not a legal ground for an injunction of the execution. Commenting on these two articles of the Code this Court has said: "It is evident that in contemplation of law, the amount of the seizure never exceeds the amount of the writ." Buisson vs. Staats, 9 Ann. 236; see Bagley vs. Tate, 10 Rob. 45; Powell vs. Hayes, 31 Ann. 789; Burgess vs. Gordy, 32 Ann. 1297; Gusman vs. DePoret, 33 Ann. 333.

II.

The complaint that the sheriff could not seize immovable before movable property, could be entertained only in a case where the party prosecuting the execution of the judgment has no privilege or mortgage, and it is already shown that the very reverse is the feature of the case in hand.

III.

If, as alleged by plaintiff in her third ground of injunction, the sheriff has not made an actual or legal seizure of her property, we are at a loss to appreciate her complaint in this particular. To prevent a seizure seems to be the "consummation most devoutly to be desired" by herself and her numerous able and zealous counsel. Gusman vs. DePoret, 33 Ann. 338. She is apparently in a predicament similar to that of plaintiff in the case of Calderwood vs. Prevost, 9 Rob. 182, to whom this Court addressed the following consolation: "In relation to the advertisement of the plaintiff's watch and chain for sale, without being seized or taken into possession by the sheriff, such a proceeding is undoubtedly irregular and illegal; but we are at a loss to perceive what injury the plaintiff has thereby sustained. He has the free use and enjoyment of these jewels, and it will be time enough for him to complain when he is disturbed in his possession of them. If, however, in the meantime, he is anxious to cure this irregularity in the proceedings of the sheriff, he can do so by placing his watch and chain in the hands of that officer."

The record shows that notice of the seizure was given to plaintiff, and if her tenants who have not been notified of the same, continue to pay rents to her, what right has she to complain? But the notice was not required by law on the tenants. Pipkin vs. Sheriff, 36 Ann. 782.

IV.

Our great respect for plaintiff's counsel will not permit us to believe that they are serious in presenting their fourth ground of injunction. What injury can befall a seized debtor through such a harmless pastime as the reinscription of a defunct mortgage, in connection with the seizure of his property? The experience of counsel will doubtless suggest several easy modes, if their client so desires, of brushing away these cobwebs.

A thorough examination of this case has left on our minds the painful impression that plaintiff's recourse to this injunction was ill-advised, and is a reprehensible abuse of the solemn process of a court to impede the administration of justice.

Our sense of duty under that impression is to consider favorably the

defendants' demand for an increase of damages. They have been retarded in a manner unwarranted by law, justice or fair dealing in their legal efforts to collect a lawful and just claim, and they must be compensated therefor.

The judgment appealed from is therefore amended for the purpose of increasing the damages of two per cent per annum interests, on the amount enjoined to ten per cent per annum on the same, and the judgment as thus amended is affirmed at plaintiff's costs in both courts.

No. 1162.

SIMON BLACK VS. REMI BORDELON, TUTOR, ET AL.

Where a judgment creditor resorts to a revocatory action to annul a sale made by his debtor, on the ground of fraud, such debtor and vendor in the contract assailed is a necessary party to the suit.

APPEAL from the Twelfth District Court, Parish of Avoyelles. *Blackman*, J.

Cullom & Coco for Plaintiff and Appellant:

1. In a revocatory action it is not necessary to make the original debtor party to the suit, where the debt has been previously liquidated by judgment. He then becomes a party without interest. C. C. 1972 and 1976; 1 L. 503; 15 L. 470; 1 R. 256, 10 R. 399; 28 Ann. 928.
2. Not only contracts but all *acts* done by the debtor in fraud of his creditors may be avoided by the revocatory action. C. C. 1989; Cross on Pleadings, p. 252, and the many authorities he cites.
3. The heir's seizin is a legal fiction which becomes a reality only when he accepts unconditionally. In the case of minor heirs, the law accepts for them the succession with the benefit of an inventory. They nor their tutors for them can accept unconditionally. 4 L. 202.
4. They cannot sue for the price of any specific property of the community, where a previous liquidation thereof does not show gains to be divided. 1 R. 378; 2 Ann. 30.
5. The immediate rights of an heir remain in abeyance until he decides whether he accepts or rejects the succession. Beneficiary heir has but a residuary interest which can only be determined when the succession has been duly administered. C. C. 947, 1033, 1073; 17 Ann. 38.
6. Heirs who accept with the benefit of an inventory have no right to be put in possession of the property until the administration thereof is closed. 27 Ann. 351.
7. With major heirs the doctrine is different. 33 Ann. 584.
8. Minors being beneficiary heirs by operation of law, cannot sue for a partition before the closing of the administration. There can be no presumption that no debts exist. 19 Ann. 293. It is necessary that they first provoke a settlement of their mother's estate. 25 Ann. 215.
9. A sale of the succession property for the purpose of effecting a partition among the heirs is not an act of administration, although it be made by an order of court through the administrator, and the sureties of the administrator cannot be held liable therefor. 22 Ann. 308.

10. Any other but a judicial partition of minor's property is a contravention of a prohibitory law, is contrary to public policy and is a nullity *ab initio*.
11. The release of a debt without payment, to defraud a creditor, can be avoided by the revocatory action. C. C. 1989.

Joffrion & Bordelon and *Thorpe & Peterman* for Defendants and Appellees:

1. In a revocatory action based upon allegations of fraud, the burden of proof is upon the plaintiff.
2. In such an action the debtor is a necessary party and must be cited. 6 R. 21; 31 Ann. 259.
3. Judicial proceedings can be annulled for irregularities or error only by appeal. They can be attacked by independent action only for fraud, deception or ill practices upon the court in the proceedings themselves. C. P., Art. 564, 607.
4. Partition of community, though subject to payment of community debts, may be made between surviving spouse and heirs of deceased, whether or not the community have been previously settled. 23 Ann. 637; 31 Ann. 572; 32 Ann. 848, 968; 33 Ann. 584.

The opinion of the Court was delivered by

TODD, J. The plaintiff, a judgment creditor of Remi Bordelon, brings a revocatory action—the present suit—to cause to be annulled a certain order of court and the sale made under it, by which, it is charged that the said Bordelon fraudulently procured the title to all his property to be placed in the names of the defendants, his minor children.

These children were alone made parties to the suit through their tutor.

There was an exception filed to the effect that all the parties in interest were not made parties to the suit; that the suit was being prosecuted against the defendants, and that Bordelon, the judgment debtor charged with the fraud of procuring the transfer of his property to his minor children to secure it from the pursuit of his creditors, was not joined in the suit. This exception was overruled by the court *a qua*. On the merits there was a verdict and judgment in favor of the defendants, and the plaintiff has appealed.

The counsel for defendants in his oral and written argument calls our attention to the ruling of the judge *a quo* on the exception, and insists that it was erroneous and asks that the same be corrected.

The appeal brings the entire proceedings in the case before us for review. It is the province of this Court to revise all errors relating to the action and rulings of the lower court to be found in the proceedings. Levy vs. Roos, 32 Ann. 1033.

Under this view we shall, therefore, first address ourselves to the consideration of the exception mentioned and the ruling of the court thereon.

That all parties in interest should be joined in a suit and made parties thereto where that interest was directly involved, would seem axiomatic. Especially would we be impressed with the truth of this proposition in a case where it was charged that a contract, to which there were two or more parties, was null because they were guilty of fraud in making it. It would seem highly unjust, if not impossible, to investigate and determine the fraud charged, and even annul the contract—the subject of it, when only one of the alleged wrong-doers was before the court, and the other not heard at all, and no opportunity given him to be heard. So far from this seeming requirement being observed in the case before us, we find that those who are not charged as participants in the fraud complained of, and in no light to be viewed other than the mere innocent beneficiaries of the same, are alone sued, whilst the one who is accused of planning and consummating the fraud, and who inaugurated and conducted the proceedings by which its purpose was accomplished, is left entirely out of the case, neither sued nor cited.

This, then, might seem on general principles a strange case, except that it is plausibly, and with some color of authority, claimed that the omission referred to and the course of proceeding adopted is specially authorized by provisions of the Civil Code and a corresponding construction by several decisions of this Court.

These provisions are those contained in Articles 1972 and 1975 of the Code.

The first (1972) reads as follows: "It (the revocatory action) cannot be exercised by individual creditors until their debts are liquidated by a judgment, unless the defendant in such action be made a party to the suit for liquidating the debt brought against the original debtor in the manner hereinafter directed."

Article 1975: "The plaintiff in the action given in this section may join the suit for annulling the contract to that which he brings against the original debtor for liquidating his debt by a judgment; and in such suit either of the defendants may controvert the demand of the plaintiff."

It is clear to our minds that the true intent and meaning of these articles is this:

That a creditor only can exercise the revocatory action, and his debt must be conclusively established, that is, by a judgment; but to favor such creditor and perhaps save needless delay, he is permitted to couple the action for the annulment of the obnoxious contract with an action to liquidate his debt by the required judgment, so that the

two causes may be proved *pari passu*, so that a judgment against the debtor and a judgment annulling the contract assailed may be pronounced at the same time.

The new disposition or character of this action, as given by the Code, necessarily implies that both parties to the contract must be joined in the suit for its nullity.

Article 1978, C. C., declares: "No contract shall be avoided by this action but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If made in good faith it cannot be annulled, although it prove injurious to the creditors; and although made in bad faith, it cannot be rescinded unless it operate to their injury."

How can it be determined whether, for instance in a contract of sale, it was made in fraud of creditors or in good faith, and whether in good or bad faith, that it was not injurious to creditors, when the vendor was not before the court? Could such vendor with any color of justice be condemned in these important respects without a hearing? It seems that such a course would not only be violative of a fundamental right, but would necessarily work oftentimes the grossest injustice.

The theory of making only the purchaser of the sale attacked a party, can rest alone on the principle that the judgment against the vendor in such contract, for the debt, is his complete and absolute condemnation on every question of fraud and wrong involved in this kind of an action.

We have carefully reviewed all the decisions to which we have been referred by plaintiff's counsel as sustaining their contention, and, in fact, have examined our entire jurisprudence on the subject, and find none that give any strong support to their position on this point. They are unsatisfactory. The direct issue embraced in the exception under discussion, we are convinced, has either not been squarely presented or, if so, not been fairly met.

Our views on this point are supported by the decision of our immediate predecessors in the case of Miltenberger vs. Weems' heirs, 31 Ann. 259, and to some extent by the authorities therein cited. * * *

This case in the lower court should not have proceeded farther than the trial of the exception, which should have been sustained and the suit dismissed.

It is therefore ordered, adjudged and decreed that the judgment of

the lower court be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered, it is now ordered, adjudged and decreed that the exception filed in the court below relating to the non-joinder of the necessary parties to the suit and considered in the opinion, be and the same is hereby sustained, and the suit dismissed at the plaintiff's costs in both courts.

No. 1267.

SUCCESSION OF MELANY FOREMAN.

1. When separate funds or property of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband to the amount of such fund or the value of such property. But the evidence must establish, with reasonable certainty, that the funds were thus used or the property thus employed.
2. The community of acquets and gains includes, at its dissolution, presumptively, everything found in the succession of the deceased spouse, and without reference to the amount brought into the marriage by the respective spouses.

APPEAL from the Twenty-fifth District Court, Parish of Lafayette. *DeBaillion*, J.

J. A. Chargois for the Administrator.

M. E. Girard for Opponents and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Melany Foreman died intestate on the 6th of September, 1880, her husband, Edward Hoffpauir, surviving her, and having no forced heirs to her estate, which consisted principally of an undivided one-half interest in the community property.

On the 15th of December, 1881, Garland Foreman, one of the collateral heirs of the deceased, applied to be appointed administrator of her estate, but same was successfully opposed by her surviving husband, who was duly appointed and qualified on the 16th of March, 1882, having previously caused an inventory to be taken of the property of her estate, which was valued at $1,588.05—including $70 in cash.

On the 1st of June, 1882, the administrator caused the property to be sold, and the sale yielded the sum of $2,067.10; and on the 11th of May, 1883, filed his final account on which he charged himself with the oregoing sums aggregating $2,137.10, and credited himself with expenditures in discharge of *debts of the community* $1,183.50 and $401.57

expenses of administration. He makes an allowance in favor of his deceased wife of $204.25 on account of her separate estate, part of which was brought by her in marriage and the remainder was inherited from the estate of her mother. He also enters a claim in his own favor for $3,303 as the value of a lot of cattle, horses, sheep, hogs and cash he owned at the date of his marriage with the deceased "and which were expended for the benefit of the community."

Casting up these accounts he shows his wife's succession to be indebted to him the sum of $2,521.07.

The homologation of this account is opposed by the collateral relations of the deceased upon the ground that, at the death of Melany Foreman, there was on hand about $6,000 in cash, and of this $900 in gold; an amount due to the community and afterwards collected by Edward Hoffpauir, $1,899; and property by him sold, $1,559.50; all of which is unaccounted for. Also a lot of stock sold, and the proceeds thereof by him applied to his own use, $1,400.

Opponents also allege that the estate does not owe and is not chargeable with any of the items carried on the tableau under the head of the passive mass; and they specially object to the item of $3,303 charged in favor of *his separate* account.

In an amended opposition, they charge the administrator with two hundred panels of fencing, ond one horse disposed of by him, and the same is unaccounted for in the account opposed.

The judge *a quo* rejected the account presented and restated same as follows, viz:

Dr.

To amount cash and sale	$2,137 10

Cr.

By debts paid	$953 60	
By expenses administrator	401 57	
By due E. Hoffpauir by community	405 00	1,760 17
Balance due community		$ 386 93

And, as thus reformed, the administrator's account was homologated and opponents have alone appealed.

II.

The judge *a quo* disallowed the entire demand of Edward Hoffpauir for value of his separate property, for the reason that same was not shown by the evidence to have fallen into the community; but he allowed "all bills and accounts paid, as shown by receipts."

In the decree appealed from, no disposition is made of the counter

demand of opponents; but they may be considered as inferentially disallowed.

An examination of the record satisfies us that the following items placed on the account and allowed by the judge *a quo* should be and are rejected and disallowed, viz:

Amount paid D. W. D. White	$132 00
Amount paid Isaac Wise	7 85
Amount paid Dr. M. L. Lyons	30 00
Amount paid Mrs. Willis	43 75
Amount contingent expenses	40 00
Aggregating	$253 60

and that all others should be and same are approved and allowed.

III.

Edward Hoffpauir states as a witness, in respect to his own claims, that he was married to the deceased, Melany Foreman, about fifty years ago, and that at that date he was branding sixty-six calves—wild cattle—and had about twenty head of wild horses and mares and four gentle horses, also about thirty head of sheep and fifty head of hogs, and $200 in cash; and that he subsequently received $500 in cash.

Says he was a cow-boy, and was twenty-two years old when he married, and thereafter lived happily.

Nathan Hoffpauir corroborates his brother's statement. But neither of these witnesses disclosed, if they knew, what disposition was made of any part of this property. It is quite certain that they do not state that same was used by the community of acquets and gains thereafter existing between himself and deceased, and hence it was not legally chargeable with the value thereof; and the claim thereto of Edward Hoffpauir was properly rejected by the judge *a quo*. 26 Ann. 605, Blair vs. Dominguez; 2 Ann. 44; 11 Ann. 297; 10 R. 181, Stewart vs. Packwood; 6 R. 508; 10 R. 18; 30 Ann. 275, Denegre vs. Denegre; 15 Ann. 597.

IV.

With regard to the demands and counter claims urged by opponents, we find the following items supported by sufficient evidence, and same are therefore allowed, viz:

Amount paid Ed. Hoffpauir by George Morgan since death of Melany Foreman	$ 200 00
Amount paid Ed. Hoffpauir by Elijah Green	500 00
Amount paid Ed. Hoffpauir by Isaac Foreman	99 00
Amount paid Ed. Hoffpauir by Garland Foreman	1,100 00
Aggregating	$1,899 00

There is some evidence in the record to the effect that, at the death of Melany Foreman, there was a field or pasture that was enclosed with a picket fence, and that same was removed or disposed of afterwards, presumably with the consent or knowledge of her surviving husband; and also that certain stock, hack, wagon and horses were likewise disposed of, and for which he should be held responsible on his account; but it is entirely too disultory and unsatisfactory to support a judgment. The amount, nor value of same, is not fully proven, and it does not appear clearly that same were disposed subsequent to Melany Foreman's death; yet the testimony on this point is confirmatory of her husband's other indebtedness.

V.

From a careful scrutiny of the testimony of the numerous witnesses that were interrogated, we conclude that the account as restated by the judge *a qno* should be canceled, and same is hereby amended in the following particulars, viz:

DR.

To amount cash and sale	$2,137 10
To amount debts collected	1,899 00
	$4,036 10

CR.

By amount of expenses and by debts paid	1,506 57
Balance due community between deceased and administrator,	$2,529 53

To one-half of this sum the opponents are entitled, inasmuch as the surviving husband has married a second wife and has thereby lost the usufruct of same; but we will not adjudge the administrator to pay interest as the date of his second marriage is not fixed by the evidence.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended, and the administrator's account as restated be approved and homologated and made the judgment of the court, and the appellee pay all costs.

ON APPLICATION FOR REHEARING.

An application for rehearing has been made by opponents and appellants, an examination of which has convinced us that the *debit* items of the account as recast in original opinion, need some correction; though the opponents are in error in placing "the amount of expenses and debts paid at $1,331.47 in lieu of $1,506.57, as announced in opinion."

The item of "amount due E. Hoffpauir by community, $405, allowed in the account, as restated by the judge *a quo*, is in error, because all

the claims allowed him were rejected by us; and we neglected to deduct from the community assets the amount of the paraphernal claim of deceased, which was shown to be $284.25, and this sum we failed to allow to the opponents.

Adjusting these balances and again restating the account, we have the following, viz:

DR.

To amount cash and sale	$2,137 10
To amount debts collected	1,899 00
	$4,036 10

CR.

By amount of expenses and debts paid in course of administration	1,101 57
By amount to balance	$2,934 53
Less paraphernal claim of the deceased	284 25
Balance due community	$2,650 28
One half due opponents	1,325 14
Also deceased's separate claim	284 25
Total due opponents	$1,609 39

And it is therefore ordered, adjudged and decreed, that the opinion and decree herein previously rendered be and the same is hereby amended and corrected so as to conform to the views herein expressed, and that as thus amended and corrected, our original opinion remains undisturbed.

Rehearing refused.

No. 1271.

HOWARD HOFFPAUIR, PRESIDENT OF AND REPRESENTING THE POLICE JURY OF VERMILION PARISH VS. SOLOMON WISE.

The Supreme Court will notice *ex proprio motu* radical defects of pleadings in consequence of which no final judgment could be rendered in the premises.

Police juries like all other corporations created under the laws of Louisiana are artificia beings or persons who can act only in the mode prescribed by the law creating them. The president cannot stand in judgment for the police jury, without special authorization. Affirming Police Jury of Ouachita vs. Mayor and Council of Monroe, 38 Ann.

APPEAL from the Third Ward Justice's Court, Parish of Vermilion. *Labauve*, J.

W. W. Edwards for Plaintiff and Appellant:

Police Jury vs. Wise.

1. The title to Act No. 84 of the Acts of 1878, is sufficient to sustain all the provisions of the act, either under the Constitution of 1868 or 1879. State vs. Bott, 31 Ann. 663; 37 Ann. 191; Cooley on Const Lim. pp. 144 (marg.) and 145; Blumenthal vs. Huerter, Western Rep. vol. 1, p. 634 (Sup. Ct. of Ill.); Slack vs Ray, 26 Ann. 675; Police Jury vs. Colomb, 20 Ann. 198; New Orleans vs. R R. Co., 27 Ann. 415; State vs. Henry, 15 Ann. 297; Art. 86, Const. 1879; State vs. Natal, No. 9582, 38 Ann. —, (not yet reported.(
2. If a portion of said Act No. 84 is unconstitutional and void, enough remains which is valid, and must be held good. See Cooley on Const. Lim. pp. 178 (marg.) and 180; 14 Ann. 7; 33 Ann. 783; 35 Ann. 1141.
3. The Court will never hold a law to be unconstitutional, unless it is clearly so. 20 Ann. 587, 198.
4. The prohibitions of the ordinance of the police jury sued on can be enforced without the aid of the latter portion of Sec. 1, Act 84. See R. S. 1870, sec. 2743.
5. The Legislature can delegate to municipal corporations certain legislative power to regulate police, sanitary and tax matters, such as in the present instance are conferred on police juries by said Act No. 84. Cooley on Const. Lim. pp. (marg.) 118 and 211; Dillon Munic. Corp. sec. 308; Minden vs. Silverstein, 36 Ann. 912; 35 Ann. 1010.
6. Act 84 of 1878, and the ordinance thereunder, are not local, nor a "regulation of trade." State vs. Dalon, 35 Ann. 1141; Cooley, p. 588 (marg.).
7. The charter of Abbeville, as to section 6, was repealed by implication, clearly so far as the present suit is concerned, by the third section of said Act 84 of 1878. See sec. 3, Act 84, and also sec. 2, 20 Ann. 140.

P. P. O'Bryan and *R. S. Perry* for Defendant and Appellee:

Act 84 of 1878 is unconstitutional, because the object of the provision declaring violations of ordinances of the police juries shall be treated as misdemeanors, and prosecuted on information or indictment, is not mentioned in its title. 33 Ann. 981.

It is unconstitutional, because that clause being vital to it, and unconstitutional, the balance of the act falls with it, and because of that unconstitutionality. Sedgwick on Construction, p. 413, note (a).

Police jury ordinances passed pursuant to Act 84 are for that reason void.

Police juries can exercise no power not delegated to them. Dillon's Municipal Corporations, §§ 89, 141.

The power of regulating the sale of iotoxicating liquors is restricted to the General Assembly by Constitution of 1879, Art. 170. An act of the Assembly delegating the power is not an act of regulation, but is an abandonment of the power to regulate to another.

The intention of Article 170 was that the Assembly might pass a general law, and to preclude all local laws.

There is no act of the Assembly which purports to delegate such power to the police juries, except Act 84 of 1878, and Revised Statutes 2743, which acts are unconstitutional. The section of R. S. refers to liquors solely.

Any such acts, if in existence, are unconstitutional, because in conflict with Article 46 of the State Constitution, which restricts the power to regulate trade, whether in exercise of the police or any other power, to the General Assembly, and excludes it from delegating the power.

Local laws of the General Assembly, or of the local authorities, are unequal and unjust in their operation, and are in conflict with the laws of the land and the Constitution of the State. 33 Ann. 985.

By special Act 103 of 1850, the police jury of Vermilion is excluded from exercising any jurisdiction within the corporate limits of the town of Abbeville, and its ordinances are ineffective there. The act has not been repealed.

All ordinances of police juries not authorized by a legal delegation of power, are illegal and null.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff, claiming to represent the police jury of Vermilion parish, brought this suit for the enforcement of an ordinance of the police jury prohibiting the sale of goods and merchandise on Sundays within the limits of that parish; and he prosecutes this appeal from a judgment declaring the ordinance sued upon to be null and void, and rejecting his demand.

The record discloses a fatal error in the pleadings which we are compelled to notice *ex proprio motu*.

In his petition plaintiff alleges that he herein sues "in the name of the police jury of Vermilion parish, for the use and benefit of the parish of Vermilion," but he nowhere alleges that he was specially authorized to stand in judgment for the police jury, and naturally he made no attempt to introduce any proof of such authority.

The ordinance sought to be enforced is in the record and contains the following significant clause:

"*Resolved, further*, That it shall be the duty of the district attorney to institute and prosecute suits for the recovery of all fines that may be incurred by parties violating the provisions of this ordinance, and to turn over to the parish treasurer the balance of all fines collected thereunder, after deducting fifteen dollars as a compensation for his services in each case."

It thus appears that, far from conferring on the president the authority to represent the parish in such suits, the police jury expressly, and in terms not to be mistaken, delegated that power to another and entirely distinct officer, who is entrusted with the additional power to receive all amounts which he may recover by suit, and to turn over the balance, after deduction of his compensation, to the treasurer.

It therefore follows that the receipt of no other officer would be satisfactory in law, and that no other officer could institute or prosecute such a suit in his own name for the use of the parish.

In the recent case of the Police Jury of the Parish of Ouachita vs. Mayor and City Council of Monroe, 38 Ann. —, (not yet reported,) we had occasion to consider a similar question, and we held in that case that, although the president had alleged a special authority from the corporation for the institution of the suit, his action could not be maintained in default of proof of the pretended authorization.

Under the guidance of the laws governing corporations and prescribing the mode in which they must act and operate, and under the authority of numerous adjudications of this and of other courts of last

resort, we therein laid down the following rule, which is decisive of the point now under discussion:

"Police juries, like all other corporations created under the laws of Louisiana, are artificial beings or persons who can act only in the mode prescribed by the law creating them. No officer of a police jury can legally bind, or stand in judgment for, the corporation without special authorization."

We repeat here, as we said there, that no law of this State confers on the president of a police jury the power or authority to stand in judgment for the corporation, or to legally bind it in any contract or proceeding, in the absence of a special authorization. In this feature of their corporate powers, police juries do not differ from other municipal or private corporations. Bright vs. Metairie Cemetery Association, 33 Ann. 58.

We therefore conclude that the police jury of the parish of Vermilion is not a party to this suit, and that a judgment in favor of the defendant would not and could not legally bind that corporation; and that all proceedings herein are nullities, including the appeal bond which was executed by the plaintiff in his alleged representative capacity.

The legal result of these considerations is the dismissal of plaintiff's action as in case of non-suit, and the judgment appealed from must therefore be amended so as to conform to those views.

It is therefore ordered that the judgment of the court *a qua* be amended in so far as it absolutely rejects plaintiff's demand; that said demand be rejected and the action dismissed as in case of non-suit, at the costs of plaintiff in the lower court, and at defendant's costs on appeal.

No. 1276.

FELIX MESTAYER VS. SINSON CORRIGÉ.

1. An ordinance of a municipal corporation, authorizing the exaction of certain rates, fees, charges and tariffs from each and every person selling articles within its corporate limits, but *without* the market-house or market-place; or person keeping a butcher's stand *within* the corporate limits, but *without* the market-place, or market-house, for the purpose of raising *revenue*, is one exacting a "tax" or "license" for revenue, and same cannot be enforced as contributions sought to be raised by the exercise of the police power delegated to it.
2. The taxing power of a municipality is its only power for obtaining revenue, by exactions levied on its citizens, and that power is limited to the *ad valorem*, or property tax, and the license tax; and any statute or municipal ordinance authorizing a levy beyond the constitutional limitation is null and void.

APPEAL from the Twenty-first District Court, Parish of Iberia. *Gates*, J.

R. S. Perry for Plaintiff and Appellant:

A charge or fee on sale of marketable commodities imposed by a municipal corporrtion for purposes of revenue, are not legal. If imposed under the police power, for police purposes, they are legal.

The police power of the State, as to exclusively local matters and subject to the restrictions of constitutional limitations, may be delegated by the General Assembly to the local authorities.

The markets are peculiarly an object for police regulation.

Article 19 of the charter of New Iberia, adopted in 1886, pursuant to Act 110 of 1880, confers plenary power of supervision and control of markets on the board of trustees.

The right to collect a daily fee for each stall is maintainable. 34 Ann. 1051, *et seq.*

The town ordinance of 10th August, 1885, expressly imposes a charge of twenty-five cents on each stall in the corporation market-house.

Article 19 of the charter authorizes the board to permit outside stalls and stands, only on condition they shall pay same charges as are paid by stalls in the corporation market-house.

By establishing a stall outside the corporation market, Courrégé has accepted that condition and has agreed, tacitly, at any rate, to pay the charges legally imposed on stalls in that market. The case of Blaser, 36 Ann. 363, is not applicable.

The collection of fees legally imposed by the board may be imposed by forfeitures and fines, which may be collected by ordinary suit, as is provided by ordinance of 10th August, 1885. 34 Ann. 1051.

Article 19 of the charter conferred such authority on the board. 34 Ann. 1051; 30 Ann. 1003; 32 Ann. 1278; Dillon on Corporations, 3d edition, §§ 432, 433, *et seq.*

T. D. Foster and *E. Simon* for Defendant and Appellee:

1. Political corporations have no inherent power to levy a tax. They must derive this power by grant from the Legislature, and it must be expressly conferred. See Cooley on Taxation, pp. 208, 396, 408; Cooley on Const. Limitation, pp. 191, 201; 33 Ann. 833; Dillon on Corporations, vol. 2, secs. 605, 606; Ibid, vol, 1, p. 396.
2. The right to make all needful regulations under the police power, give no right to tax for revenue. Dillon on Corporations, vol. 2, pp. 709, 710, sec. 609; 34 Ann. 1050.
3. License laws are of two kinds. First, those for raising a revenue; second, those for police regulation. The first include the exercise of the power of taxation, and, in this State, those of every profession, trade or calling subject to pay a tax are graduated and governed by special laws, according to gross receipts. The second, viz: police power, cannot exceed the costs of issuing the license and the costs of regulating the business. Cooley on Const. Law, p. 586; 31 Ann. 829; Acts of General Assembly, 1881.
4. Political corporations cannot impose a greater license tax than is imposed for State purposes. Constitution 1879, art. 206; 34 Ann. 840.

   Nor can they impose a greater tax on property than the maximum limit allowed by the Constitution of the State. See Article 209 of State Constitution; 34 Ann. 840; 36 Ann. 363.
5. The police power cannot be used for the purpose of raising revenue. See Dillon on Municipal Corporations, 3d ed., § 768; 34 Ann. 750, 1052.
6. To bring a charge, tariff or tax when levied within the scope of a police regulation, it must be shown that the amount thus levied is used exclusively for that purpose. 34 Ann. 1052; 36 Ann. 363.

The failure to do this establishes the charge, etc., to be a license tax for revenue, and if in excess of the license tax of the State it is unconstitutional and cannot be collected. In this case it is far in excess. See Ordinance of Board of Trustees, p. —; State Constitution, arts. 203, 206, 209; 34 Ann. 840; 36 Ann. 363.

7. An exaction and charge of a specified and fixed amount in money for the daily privilege of pursuing a business useful and necessary to the community and in no shape dangerous or vicious, is to be taken as one made and levied for revenue and not a police regulation. 34 Ann. 750, 1050; 36 Ann. 363.

The amount charged and levied in the ordinance being so extortionate and exorbitant, is itself evidence of the purpose to raise a revenue, to say nothing of the facts which disclose beyond question the purpose to be to raise a revenue, and divests it of all semblance of police power. 31 Ann. 828; Dillon on Mun. Corp. sec. 361, note § 386.

8. Such exorbitant and extortionate daily charges of specified amounts for every slaughtered animal is a license or tax, and is intended to raise a revenue, and in either instance is unconstitutional. 34 Ann. 1050; 36 Ann. 363.

9. The police power of the town of New Iberia cannot be exercised beyond that granted by the Legislature in its charter. What the town pretends to do as a police regulation must have been clearly granted by the charter. 36 Ann. 363; 29 Ann. 21, 261; 32 Ann. 923, 1293; 34 Ann. 750, 1051; Cooley on Const. Limitation, 191, 387; Dillon on Mun. Corp., 3rd ed., 141; Cooley on Taxation, 408.

10. When the power to exact money for police regulation is granted, it is more narrowly construed than that for revenue; and in all cases when it is granted it has always been restricted to a reasonable fee for issuing the "license." The power to make police regulations for the government of markets, etc., does not carry with it and include the power to exact money and license fees. See Cooley on Taxation, 408; Dillon on Mun. Corp. 3d ed., §§ 361, 357 (2d ed., § 291); § 768 (2d ed., 609); 538, note 1; 350, note 361; 34 Ann. 1050.

11. Political corporations have no right to enforce obedience to its ordinances unless that power has been expressly granted by the General Assembly, and no right to collect its revenues, whether taxes or license taxes, legal or illegal, by fine or imprisonment, unless that right is granted in its charter by the General Assembly. 6 Ann. 515; 34 Ann. 751; 37 Ann. —.

12. In determining the constitutionality of a town ordinance, the active effect of it must be considered, rather than the mere reading. The evidence establishes its active effect, and in the instant case shows beyond doubt that its object is to raise a revenue and is unconstitutional; because, if a tax on property it is in excess of the maximum limit; if a license tax, it is in excess of that levied by the State of Louisiana, and hence unconstitutional. See Constitution of the State of Louisiana 1879, arts. 209, 206; Acts of General Assembly 1881 (extra session), No. 4; 36 Ann. 363.

13. The case of the State of Louisiana vs. Louis Blaser, reported in 36 Ann 363, identical with this case both in the law and facts.

14. A charge of a specified amount for the privilege of keeping a market is a license or tax. 34 Ann. 1050.

The opinion of the Court was delivered by

WATKINS, J. Defendant resists an ordinance of the town of New Iberia, exacting certain rates, fees, charges and tariffs daily from each person selling the articles mentioned or keeping butcher or market stands, *anywhere within the corporate limits* of that town, and whether within or without the market; and conferring the right to collect same

as a franchise of the market-house upon the lessee of the same, who is given the right to bring suit before the mayor of the town or any justice of the peace having jurisdiction for the collection of said daily rates and charges, and for the enforcement of the penalty of five dollars against such person as shall forfeit to the corporation or to the lessee of the corporation market-house "for each and every refusal to pay said rates, fees, tariffs and charges herein established when due," etc.

These rates and charges are the following, viz:

1.	From each and every butcher's stand situated within the Main Market, and also from each and every butcher's stand outside of said Main Market and within the corporate limits of said town	$0 25
2.	For each slaughtered beef	60
3.	For each slaughtered calf, provided the forequarters do not weigh over fifty pounds	40
4.	For each slaughtered calf, provided the forequarters do not weigh over fifty pounds	50
5.	For each slaughtered hog weighing over one hundred pounds	50
6.	For each slaughtered sheep	30

* * * * * * * * * *

I.

The plaintiff alleges himself to be the lessee of the corporation market-house in the town of New Iberia, pursuant to an ordinance passed by the board of trustees on the 10th of August, 1885, and that he has complied with all the terms and conditions thereof, and that he, as such lessee, is entitled to collect all said charges and penalties as are either permitted or imposed by the corporation as rights and franchises of said market-house.

He shows that his lease began on the 1st of September, 1885, and will conclude or terminate on the 31st of August, 1886. He shows that the defendant, Simon Corrigé, "has for *several years* past carried on the business of butcher within said corporate limits at a stand or market place outside of said corporation market-house, and that for the last twelve months he has kept his said stand on the southwest side of Main street, in the upper portion thereof, as he does" at this time, and is due him $371.80 for which he prays judgment.

Defendant denies the right of plaintiff to recover on the ground that the ordinance under which he sues as lessee "is unconstitutional, illegal and unwarranted in law, because the exactions and charges it imposes is a tax or license for *revenue* * * and it is violative of the

Constitution and existing laws of the State * * * * and said pretended ordinance * * is unconstitutional and illegal, on the further ground that neither the law of the State nor the charter of the town of New Iberia gives the power and legal right to enforce the collection of its revenues by fine for violation of its ordinances, whenever it is attempted to collect a license or tax for *revenue*, which is the object of this illegal ordinance."

The question propounded is whether the rates, charges and fees sought to be collected, and authorized by the statute and ordinance complained of were, in the nature of a tax or license, granted under the taxing power of the State; or constituted a contribution sought to be raised in the exercise of the police power of the State, delegated by statute to the city of New Iberia.

The taxing power of the city of New Iberia is its only power for obtaining revenue by exactions levied on its citizens, and that power is limited to the *ad volorem* or property tax and the license tax.

The Constitution declares that "no parish or *municipal tax* for all purposes whatsoever, shall exceed ten mills on the dollar of valuation, etc." Constitution, art. 209.

It is obvious that if the statute or ordinance in question attempted or was intended to authorize a municipal tax beyond the constitutional limitation, to be either assessed or collected in the manner indicated, same would be undoubtedly unconstitutional and void. 36 Ann. 363, State vs. Louis Blaser; 34 Ann. 750, State vs. Patamia; 6 Ann. 515, Municipality No. 1 vs. Pauce.

II.

Can plaintiff's right be recognized and enforced upon the theory that these rates and charges are contributions legally authorized by the State in the exercise of its *police power?*

The Constitution provides that "the exercise of the police power of the State, shall never be abridged, etc." Const. Art. 235.

It also provides that "the police juries of the several parishes, and *the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits*, etc." Const. Art. 248.

In 34 Ann. 1050, Delecambre vs. Clere, this Court had the question now before us under consideration and there held: "Whilst this section conferred authority incident to police powers to regulate private markets or the selling at private stands of meats, etc., and the right even to suppress the same and to impose fines and penalties to enforce its ordinances on the subject and punish their violation, *it conferred no*

power to levy a tax, or license, or fee, tariff, or rate, as it is termed in this case, on butchers and other persons.

"There is a recognized distinction between the taxing power and the police power conferred on corporations. Licenses or taxes may be imposed on certain branches as a *regulation under the exercise of the latter power*, but it must plainly appear that they are imposed strictly and exclusively in aid of such power and not for the purpose of *revenue*. The rule is that mere police power, and the right to make needful regulations under it, gives no right to tax for revenue."

In Dillon on Municipal Corporations, it is announced that the authority to establish and control markets is one of the police powers that may be exercised by municipalities. Sec. 93.

"The *taxing* power is to be distinguished from the *police* power. * * The power to *license and regulate* particular branches of business or matters *is usually a police power;* but when license, fees, or exactions are *plainly* imposed for the *sole* or *main* purpose of *revenue*, they are in effect *taxes*."

Again: "Ordinarily the mere power to license or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it *may give* the power when such appears from the nature of the subject matter and upon the whole charter or enactment, to have been the legislative intent, but not otherwise." 2 Dillon, Municipal Corp., Sec. 609.

"In harmony with the foregoing principles it has been held that, under the authority to license and regulate draymen, etc., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but cannot, by virtue of this authority, *without more*, levy a tax upon the occupation itself; and under the power *to regulate*, it may make proper police regulations as to the *mode* in which the employment shall be exercised." Same, Sec. 292.

"So authority to a city to adopt rules and orders 'for the due regution of omnibuses, stages,' etc., was held not to authorize the adoption of an ordinance requiring the payment of a tax or duty, on each carriage licensed, ranging from one to twenty dollars, according to the different kinds of carriages and stands occupied.

"This was regarded as a direct tax upon the vehicle used or its owner, and not necessary to secure the objects of the above grant of power to the city." Same, Sec. 293; 12 Wallace, 418, Ward vs. Maryland; 29 Ann. 261, Mayor vs. Gustave Roth; 32 Ann. 923, Board of Trustees of New Iberia vs. Migins; Cooley on Taxation, p. 387.

In Delecambre vs. Clere, this Court held that a charge of "twenty-five cents per day, termed a tariff or fee for keeping a *private butcher's stand* within the corporate limits of said town," was in that instance a license or tax imposed upon the calling or occupation of the defendant which was that of a butcher.

After a careful review of all the authorities cited and others at hand, we have reached the conclusion that all of the exactions demanded are within the terms "tax" and "license," and that same were manifestly intended by the mayor and trustees of the city of New Iberia to constitute a source of revenue under the apparent exercise of delegated police power, and that said statute and ordinance are unconstitutional, null and void to the extent of plaintiffs demands and that the judgment of the district court should be and the same is hereby affirmed.

This decree does not apply to that part of the ordinance which authorizes the exaction of twenty-five cents "from each and every butcher's stand situated *within* the Main Market."

Judgment affirmed.

No. 1277.

James A. Kinder vs. David H. Lyons, Sheriff, et al.

1. Under the amendment of Article 81 of the Constitution of 1879, this Court has appellate jurisdiction of suits involving rights to homesteads, irrespective of the value of the property alleged to be exempt.
2. Homestead provisions of the Constitution of 1879 avail only those who register claims therefor, antecedent to contracting debts sought to be enforced against it.
3. A judgment liquidates, but does not create a debt. It recognizes existing, but confers no new or additional rights.
4. Property exempted from seizure and sale, under the provisions of the homestead law of 1865, is predial and not urban.
5. Laws conferring homestead rights must be strictly construed.

APPEAL from the Fourteenth District Court, Parish of Calcasieu. *Read*, J.

Geo. H. Wells & Son for Plaintiff and Appellee.

G. A. Fournet for Defendant and Appellant.

On Motion to Dismiss Appeal.

The opinion of the Court was delivered by

Watkins, J. Plaintiff requests us to dismiss this appeal on the ground that the amount in controversy is below the lower limit of the jurisdiction of this Court.

Plaintiff's petition discloses his action to be one restraining the sheriff and seizing creditors from selling certain property he claims to have registered and set apart as a homestead and which he avers to be exempt from seizure, under the provisions of the act of the legislature of 1865 and Articles 219 and 220 of the Constitution of 1879 and Act 114 of 1880. He alleges that said property is worth $1,800, and that the illegal seizure thereof has caused him damage to the extent of $200 attorney's fees and $350 general damages, the whole exceeding $2,000 in amount.

The trial was by jury, and there was a general verdict in favor of the plaintiff, without damages, and the defendants, Marx & Kempner, plaintiffs in execution, appealed.

It is not "the *amount* in dispute," but the *matter* in dispute, in such case, that gives this Court appellate jurisdiction. Under the amendment of Article 81 of Constitution of 1879, this Court has appellate jurisdiction of "suits involving the rights to homesteads." Act No. 125 of 1882.

In a recent case this Court said of this amendment: "It is over *such* cases of homesteads alone, as are mentioned in the present Constitution, that this Court has *exclusive* jurisdiction. 37 Ann. 109, State ex rel. Davidson vs. Judge.

The motion is refused.

ON THE MERITS.

I.

The following is a statement of this case:

The plaintiff alleges in substance that he is the owner of a house and lot in the town of Lake Charles, occupied by himself and family; that he is the head of a family dependent upon him for support; that he has set apart and registered this house and lot as a homestead; that this property is exempt from seizure and sale under the law of 1865, Articles 219 and 220 of the Constitution of 1879, and Act No. 114 of 1880; that he registered his homestead June 15, 1882; and that the judgment under which the seizure was made was rendered after the registry and setting apart of said property as a homestead.

The defendants' answer, coupled with an exception of no cause of action, is an express denial that plaintiff is entitled to the homestead exemption, in bar of defendant's claim; they aver that the debts, for which the judgments sought to be executed were obtained, were contracted previous to the adoption of the Constitution of 1879; that no rights of homestead or exemptions from seizure and sale, as against

said debts, were vested in plaintiff by virtue of Articles 219 and 220 of the Constitution of 1879, or Act 114 of 1880; that the property seized is urban property and cannot be claimed as a homestead exemption under the Act of 1865; and that the plaintiff has no *right of action* either under the laws of 1865, the Constitution of 1879, or Act 114 of 1880, because the registry of his pretended homestead could impair no previously acquired rights of the defendant's seizing creditors to have said property seized and sold to satisfy just and legitimate debts previously contracted.

In the succession of Furniss, 34 Ann. 1013, this Court held: "Under the homestead provisions of the Constitution of 1879, the exemptions therein provided only take effect from the date of registry, as provided by law, and are *inoperative against debts contracted prior to* such registry."

Parties invoking the protection of the homestead laws, which are in derogation of common rights and must be strictly construed, are required to prove that they come within *both their spirit and letter.* Galligan vs. Payne, 34 Ann. 1057, and authorities therein cited; 37 Ann. 263.

In Thomas vs. Guilbeau, 35 Ann. 927, this Court held: "Claims of homestead exemptions affecting *debts* and contracts which existed *previous* to the adoption of the Constitution of 1879, must be controlled by the legislation in force at the time the *contract* was entered into." 34 Ann. 831, Poole vs. Cook; 32 Ann. 980, Gilmer vs. O'Neal.

In the case quoted from, the Court say: "The debt which they seek to enforce was *not created* by the judgment of October, 1880, which conferred no new right, but merely recognized rights and obligations which were created by the Act * * of June 26, 1877. Hence, the contract from which plaintiff's obligation springs was made and entered into in 1877, and all homestead rights affecting the same must be governed by the laws then in force." Page 929.

Plaintiff's declaration of his homestead exemption of property involved in this controversy was filed for record, and recorded on the 15th of June, 1882.

The petition in the suit of Marx & Kempner vs. James A. Kinder, No. 598, recites that it was brought upon defendant's promissory note for $247 50, bearing date October 17, 1877, and payable on the 1st of January, 1878, with interest from date, and the note is annexed; though judgment was not signed until June 19, 1882.

The suit No. 599 was brought upon the joint note of Sam. Kinder and J. A. Kinder, for $411 51, bearing date September 10, 1877, and

falling due on the 10th of January, 1878, and judgment was signed on the 18th of June 1882.

The facts of this case are quite similar to those presented in the case of Thomas vs. Guilbeau, and the same ruling is applicable.

II.

It has been frequently decided by our predecessors that the property exempted from seizure and sale under section 1691 of the Revised Statutes of 1870, which embodies the provisions of the homestead law of 1865, is predial and not urban. 25 Ann. 219; Crilly vs. Sheriff; 26 Ann. 645, Hargrove vs. Flournoy; 28 Ann. 575. Roberts vs. Gordy.

Our conclusion is that plaintiff's homestead, asserted under both the Act of 1865 and the Constitution of 1879, can be sustained under neither.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment of the district court appealed from be avoided, annulled and reversed; and, proceeding to render such judgment as should have been pronounced, it is ordered, adjudged and decreed that the demands of the plaintiff be rejected, and that he be taxed with the costs of both courts, and that the seizing creditors, Marx & Kempner, be permitted to proceed with the seizure and sale of the property, sale of which was enjoined, and according to law.

No. 1275.

SUCCESSION OF ZÉNON ELIZÉ THIBODEAUX.

ON OPPOSITION TO THE DEMAND OF ADMINISTRATION BY MOZART THIBODEAUX.

There is no law to justify and no room or reason for the appointment of an administrator to a succession which owes no debts, and after the property has been put in the possession of the heirs who have accepted the same, thus winding up and finally settling up the succession.

If the existence of debts should be afterwards discovered, the creditors would have re course against the heirs, but not against the succession which has ceased to exist.

APPEAL from the Twenty-first District Court, Parish of St. Martin. *Gates*, J.

Mouton & Martin for the Appellee.

Felix Voorhies for the Appellant.

The opinion of the Court was delivered by

POCHÉ, J. At the death of Zenon Elizé Thibodeaux, which occurred in 1867, an inventory of the property left by him was taken and Paul

E. Thibodeaux was appointed and qualified administrator of his succession.

In 1868, all the heirs of the deceased, including the administrator, effected among themselves a partition by authentic act of all the property depending upon said succession; and in 1881, the administrator died.

In 1885, Mozart Thibodeaux claiming to be an heir of the deceased, Z. E. Thibodeaux, filed an application for the appointment of administrator of the succession, alleging the necessity of such an administration and the death of the administrator Paul E. Thibodeaux.

His application was opposed by one of his co-heirs on the ground that the succession had been finally settled, the heirs, all of age, having been put in possession of their respective shares of the property thereof, there being no debts and there being consequently no succession to administer.

This appeal is prosecuted by the opponent from a judgment in favor of the applicant.

The record fully establishes the state of facts contended for by the opponent and appellant, and our jurisprudence has firmly settled the rule that when the heirs of a succession, which owes no debts, have been placed in possession, as such, of the property left by the decedent, there is an end of the succession which is wound up and settled, and thus ceases to exist—and that therefore there is no reason or room for an administrator.

If, after such an operation, any debts should be discovered, the recourse of creditors could not be exercised against the succession, which has no longer any existence, but against the heirs, who would thus become debtors for their virile shares of their ancestor's debts. Sevier vs. Sargent, 25 Ann. 221; Succession of Walker, 32 Ann. 321; Succession of Hebert, 33 Ann. 1107; Succession of Baumgarden, 35 Ann. 675; same, 36 Ann. 46; Succession of Geddes, 36 Ann. 963; Succession of E. S. Powell, 38 Ann. ——, not yet reported.

The applicant in this case has not even alleged the existence of any debts due by the succession, or any other legal conditions sufficient to justify his coveted appointment as administrator of a succession already wound up and fully settled.

The judgment of the district court is, therefore, manifestly erroneous, being stripped of all support either in reason or in law.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, that the opposition herein be sustained and that the application of Mozart Thibodeaux for the appointment of administrator of the succession of Zenon Elizé Thibodeaux be denied and rejected at his costs in both courts.

No. 1273.

THE STATE EX REL. POLYCARP FONTENOT VS. THE JUDGE OF THE THIRTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. LANDRY.

In appeal from a judgment rendered by a justice of the peace to a district court, where a motion is made to dismiss the same on the ground that the matter in dispute is under the lowest limit of the appellate jurisdiction of this court, the appellant should be permitted to offer evidence to maintain his appeal, unless his want of right to the appeal conclusively appears from the face of the papers.

APPLICATION for Certiorari.

Lewis & Brother, for the Relator.

W. C. Perrault and *K. Baillio*, for the Respondent:

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1. Relator in a case like the one at bar, cannot in his petition introduce new allegations or facts not appearing in the record. The court will disregard such new allegations, and decide the case on the face of the papers. 32 Ann. 1222; 33 Ann. 256.
2. A petition for certiorari which fails to aver that the respondent judge arbitrarily and without cause refused to hear relator and his witnesses, is lacking in essential averment, and no relief can be granted him thereunder. 36 Ann. 481, 482.
3. The answer or return of the respondent judge, in an application for a certiorari, being the official act of a sworn officer, is not required to be sworn. It is considered as being made under oath.
4. Under the jurisprudence of this State, prior to the year 1879, the Supreme Court could only issue the writ of certiorari when invoked in aid of its appellate jurisdiction. 15 Ann. 120; 22 Ann. 459, 517; 16 Ann. 164; 25 Ann. 381; 30 Ann. 457; 31 Ann. 795.
5. Appeals from magistrates' courts are carried directly to district courts. The only exception to this rule is where the legality or constitutionality of a municipal tax, toll or impost is put at issue, in which case only, the appeal is carried to the Supreme Court. Constitution of 1879, arts. 111 and 81.
6. The Supreme Court will not exercise the supervisory jurisdiction granted by art. 90, unless it affirmatively appears: 1st. That the lower judge was guilty of a clear usurpation of power not conferred by law. 2d. Where he has arbitrarily or without cause refused to perform some plain duty imposed upon him by law, and which he had no discretion to refuse. 3d. Where relator has no adequate remedy in any other form of proceeding. Even in these cases, the Supreme Court will not revise the action or the judgment of the lower court on the merits, but will only inquire into and revise their regularity and legality in point of form. 32 Ann. 549, 552; 33 Ann. 1201; 32 Ann. 1222; 33 Ann. 256, 255, 15. A refusal to hear or receive evidence because inadmissible, does not fall within the purview of this supervisory power. 36 Ann. 481, 482.
7. A judgment of a court wanting in jurisdiction *ratione materæ*, is null, and a clear action lies to annul it. C. P. 604, 606, par. 3. Such a judgment can be even collaterally assailed.
8. Under art. 608 C. P., the nullity of a judgment may even be demanded on appeal, provided the nullity appears on the face of the papers. But such nullity must be demanded. C. P. 608.
9. Magistrates' courts have no jurisdiction of a suit wherein "the right of property" or the "possession of an immovable" is put at issue. C. P. 1068.
10. Where an averment of jurisdiction is made, an appellate court will permit the proof of

jurisdiction by affidavit or otherwise to be made. But it is not permissible to supply by affidavit, not only the proof, but the averment of jurisdiction on appeal. 30 Ann. 1138; 31 Ann. 856; 33 Ann. 1051; 2 Ann. 293; 8 Ann. 282, H. D. p. 18, No. 1. and cases cited.

11. There is an obvious and manifest difference between the offer and the right to prove the value of the object in dispute, in the court of the first instance, and the right to do so in the appellate court. In the latter, the jurisdiction must be averred, and must appear from the face of the papers—and no evidence is admissible to supply its omission.

12. In the case at bar the district judge having properly rejected the evidence offered to eke out jurisdiction, the case was left as it was originally: with a demand by plaintiff for ten dollars damages. This amount being below the appellate jurisdiction of the district court, the appeal was properly dismissed. Const. 1879, art. 111.

The opinion of the Court was delivered by

TODD, J. This is a certiorari proceeding.

The relator alleges in substance that he was sued before a justice of peace in the parish of St. Landry, to compel him to cut a certain levee and to pay ten dollars damages caused by the levee. That judgment was rendered by said justice as asked for, that is to pay ten dollars to the plaintiff in the suit, and cut the levee complained of; that he appealed from this judgment to the Honorable the District Court of the parish of St. Landry, the Hon. G. W. Hudspeth presiding; that in said court a motion was made to dismiss the appeal on the ground that the court was without jurisdiction to entertain the appeal for the reason that the matter in dispute was below the limit of its appellate jurisdiction; that thereupon the relator offered to introduce evidence to satisfy the judge touching the question of jurisdiction by proving the money value of the demand made and the right involved respecting the said levee, and the cutting of the same sought to be effected by the suit; that the judge refused to hear said evidence, and dismissed his appeal. The relator charges that this action of the judge was error, and he seeks to have it so declared, and at the same time to compel the judge to hear his testimony offered on the trial of the motion to dismiss the appeal.

By the writ in question we can determine whether the judge erred in his refusal to hear evidence on the point in question.

In the reasons given by him for his ruling and for the dismissal of the appeal—which we find in the record—he seems to have concluded, from the face of the papers, that the only real matter in dispute was the ten dollars which the relator was condemned to pay by the judgment appealed from, and that, therefore, the question of jurisdiction was not open to evidence. Whether the court had jurisdiction to entertain the appeal is a question not now before us, but only whether

he should have heard evidence touching the question raised by the motion to dismiss.

In this court, where similar questions are presented, unless it conclusively appears from the pleadings that the court is clearly without jurisdiction, it is permitted the appellant, for the purpose of determining the question of jurisdiction and the appealibility of the case, to submit affidavits respecting the amount involved or the value of the matter in dispute, which are always viewed and received by the court as properly before it for consideration.

We do not agree with the judge *a quo* that it conclusively appeared from the face of the papers presented in the appeal before him, that his court was without jurisdiction.

The suit before the justice was to compel the relator to cut his levee and to pay ten dollars damages caused by the levee.

It might well be that the most important and valuable interest of relator involved in the suit was the right to maintain and keep intact his levee, which it was the object of the suit to compel him to destroy. We do not pretend to say that this right was of value sufficient, together even with the ten dollars in dispute, to give jurisdiction to his court of the appeal, but we do think that the record presented a sufficient showing to authorize the appellant and relator to submit evidence of the value of his said interest with a view of maintaining his appeal. Thus concluding, we think it was error in the judge to refuse to hear this evidence, and error likewise to dismiss the appeal without or before hearing it.

The order of dismissal was, under this view of the matter, premature and unauthorized, and we think, under the provisions of the article of the C. P. above quoted, that the relator is entitled to the relief asked for.

It is therefore ordered, adjudged and decreed that the ruling of the respondent judge refusing to hear evidence touching the right of the relator to maintain and relating to the jurisdiction of the court to entertain the appeal, and respecting the value of the right, interest or matter in dispute in the controversy, be and the same is hereby corrected and the order dismissing the appeal set aside, and the appeal reinstated for the purpose of permitting the relator to submit or offer evidence on the points mentioned, and subject to the motion to dismiss the appeal, at the cost of respondent.

ON APPLICATION FOR REHEARING.

I.

WATKINS, J. Respondent suggests that there is error in our judg-

ment taxing him with the costs, and insists that such a case as this is exceptional, and is not governed by the rule laid down in C. P. 549, to the effect that "in *every case* the costs shall be paid by the party cast, except when compensation has been allowed or real tenders made," etc.

But the next article is still further to the purpose: "The same rule shall be observed with regard to the party cast on *incidental demands*, whether they be dilatory or declinatory."

Relator cites the case of Borgsteed vs. Black, 5 Ann. 753, as furnishing authority for the position that is assumed by him. That was a case involving an election contest, and consequently bears no analogy to the present action. The Court said that the party cast in that suit was not bound for the costs, for two reasons: 1st. That that suit was not an ordinary civil action, but one of public concern. 2d. That the statute on the subject of contested elections did not authorize it.

In State ex rel. Montague vs. Coquillon, justice of the peace in the parish of St. Tammany, 35 Ann. 1101, in which a writ of *certiorari* against respondent was applied for to this Court, on the allegation that he had rendered judgment in an unappealable case against the relator, without allowing him a hearing, as the law requires, and the following decree was entered, viz: "It is therefore ordered, adjudged and decreed that the judgment rendered by the respondent magistrate against the relator, on the 4th June, 1883, be annulled and avoided, and that respondent be ordered to try the case anew, in conformity with the provisions of the law, and *that the respondent pay the costs of these proceedings.*"

We think this exception not well taken.

II.

Respondent further suggests that we have entertained relator's petition for a writ of *certiorari* entirely independent of the supervisory power vested in this Court by the Constitution, article 90; and which relator does not invoke, and the judgment complained of did not cite.

He then suggestively enquires: "Can this Court (independently of the powers conferred by Article 90) grant any relief in an unappealable case, by writ of *certiorari?*"

Reference to C. P. 857 and 860, will satisfy respondent's enquiry. But, if anything necessary to relator's adequate relief under them is wanting, Article 90 supplies the deficiency, and we will cite it now, in support of our complete jurisdiction.

On this we rely for a sufficient answer to the cases cited by the respondent, viz: 9 Ann. 522; 2 Ann. 979; 16 Ann. 164; 15 Ann. 120; 30 Ann. 457.

We do not understand that any set phraseology should be employed in relator's petition to entitle him to relief. It is quite sufficient that he has, in due form, made his grievances known to this Court, which is clothed by the Constitution with the supervisory power to examine and correct, and which has the undoubted authority to draw legal inferences from a given state of facts, coupled with the duty to apply the remedy. The relief was *not* granted *ex proprio motu*, nor "gratuitously extended," to a case in which no such relief was invoked. We think this Court is perfectly competent to entertain jurisdiction of the writ of *certiorari*, either alone or when coupled with *mandamus*.

III.

Respondent further insists that relator has not *presented* a case entitling him to the relief demanded; or, in other words, that this Court should not order "the district judge to reopen the case of Deville vs. Fontenot, and order him to receive evidence which, after due hearing and argument, he held inadmissible."

Relator's counsel places strong reliance upon State ex rel. Bright & Co. vs. The Judges, etc., 36 Ann. 481, and from which they quote this phrase, viz: "But that means an arbitrary refusal to hear any witnesses at all, and not to the rejection of testimony *as inadmissible*." That is to say, irrelevant to the issue.

In that case the objection that was urged to the testimony was that "it had not been properly stamped."

"This mandate *(certiorari)* is only granted in cases where the suit is to be decided in the last resort, and when there lies no appeal, by means of which proceedings absolutely void might be set aside, as where the inferior judge *has refused to hear the party or his witnesses*," etc. C. P. 857.

What was the question before the district court, and involved in the suit of Deville vs. Fontenot, then on trial? Its appellate jurisdiction of that cause. What did the court decide? That it conclusively appeared from the face of the record that it had no jurisdiction *ratione materiæ*, and refused to hear any evidence going to show the money value of the plaintiff's demand and dismissed the suit. He did not reject the evidence for the reason that same was inadmissible and not pertinent to the issue; but for the reason that the issue was one upon which no evidence could be received at all.

IV.

Relator had a perfect right to apply for the writ of *certiorari* and *mandamus* at one and the same time, or separately.

In our previous opinion and decree we granted relator no relief that was not strictly consonant with the writ of *certiorari* alone. Montague's case above cited is a complete precedent on this point.

V.

We have taken pains to express our views again, and even more in detail than before, in order to fully relieve the minds of the respondent and his zealous counsel from the erroneous impression they seem to entertain that our previous opinion was rendered gratuitously, *ex proprio motu* and without deliberate consideration.

Rehearing refused.

No. 1278.

DON LOUIS JEAN LOUIS ET AL. VS. THERENCE GIROIR ET ALS.

In a petitory action the description of the lands in suit, by sections and townships in reference to United States surveys, is sufficient. That is certain which can be made certain

A petition charging that the defendants are in joint possession of the lands in suit, is not amenable to the objection that it does not charge what portion of the several tracts sued for is in the separate possession of any of the defendants.

APPEAL from the Twenty-fifth District Court, Parish of Lafayette. *Bourges*, judge *ad hoc*.

Felix Voorhies and *E. Sinson* for Plaintiffs and Appellants.

M. E. Girard for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, in a petitory action, prosecute this appeal from a judgment maintaining an exception that their petition is too vague and indefinite to put the defendants, thirteen in number, on their several defenses, in failing to allege what portion of the two tracts of land sued for was claimed from each or any of the defendants.

The trial judge held that the description of the lands was insufficient, and that the petition was defective for the additional reason that it failed to allege what definite portion of the land was occupied by each or any of the defendants.

The insufficiency of the description of the lands had not been specifically set up by the defendants, and in our opinion the judge committed a double error in resting his judgment thereon. The defendants had not complained of the description. But in point of fact the de-

scription is sufficient. The lands are described as: "Sections 93 and 94, in township 10 south, range 5 east, southwestern district of Louisiana, situated in the parish of Lafayette."

By consulting the United States surveys the lands may be accurately located, and a greater precision is not required in a petitory action. That is certain which can be rendered certain. Lea vs. Terry, 15 Ann. 160.

As we read the petition, we understand that the defendants are sued jointly and that they are charged to be illegally in joint possession of the two tracts of land which are contiguous. If such be the charge intended to be made by plaintiffs, they surely could not be required to state otherwise or differently.

It may be, as suggested by defendants' counsel, that their possession is several and not joint. But that defense cannot be considered in determining the alleged insufficiency and vagueness of plaintiffs' pleadings.

That ground is contained in another exception which defendants have interposed, but as that and other exceptions were not passed upon by the trial judge we are powerless to review them in the present appeal. In due time they may claim our attention. Harris vs. Pickett, 37 Ann. 747. We are limited to the disposition of the matters only which are brought up in each appeal.

To the extent of our examination we conclude that the views of the district judge are erroneous.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed; that the exception maintained be overruled, and that the case be remanded for further proceedings, costs of this appeal to be taxed to defendants and appellees, other costs to abide the final determination of the cause.

No. 1281.

J. O. HALPHEN VS. U. A. GUILBEAU AND T. LÉZAIR BROUSSARD.

1. Under the provisions of Act No. 40 of 1880, the judge of an adjoining district, who is called to try a cause, in which the presiding judge is recused, acts *pro hac vice* and in *that court*, and during the time he is thus engaged in the performance of duty, the presiding judge is displaced.
2. The judge of an adjoining district thus appointed, has no authority to grant an order at chambers within his own judicial district, and in his capacity as judge of the latter, transferring the suit to an adjoining district. Such an act is a nullity.

APPEAL from the Thirteenth District Court, Parish of St. Landry. *Hudspeth*, J.

C. H. Mouton, Jos. A. Breaux, Edward Simon and *F. F. Perrodin* for Plaintiffs and Appellant:

1. Nine months having elapsed—since the case had been transferred—a transfer was absolutely necessary under the terms of the law.
2. Notice prior to transfer was not necessary. The law being mandatory had to be obeyed. It was thus obeyed in the case to which reference is made in the body of the brief. Court and suitors accepted the transfer in said case and not a word was said about the necessity or the most remote propriety of such a notice.
3. The order was granted at chambers in the case at bar. There was nothing illegal in that. Such an order can be granted at chambers under section 1936, R. S.
4. The judge to whom the case was transferred, had full authority in the premises until the nine months had elapsed; after that time, the court to whom transferred had full authority.
5. The dismissal of an exception, the reversal of the judgment of dismissal and the reinstatement of the case by the Supreme Court, is not a trial; the case has not been tried, and under Act 40 of 1880, it could be transferred.
6. The act of the judge in transferring a case "must not be interfered with, except in extreme cases of glaring wrong or of unbearable injustice." Fontelieu et al vs. Conrad DeBaillon, Judge, et al—decision rendered not reported.

H. L. Garland, R. S. Perry and *Felix Voorhies* for Defendants and Appellees:

A transfer under sec. 5 of Act No. 40 of 1880, is a change of venue and must be governed by R. S. 3901 *et seq*.

No transfer of a case can be made at chambers except in changes of venue, and contradictorily with all parties interested.

No default can be entered before the court to which a case is transferred, unless opposing parties be notified of the transfer.

An application to transfer, under Act No. 40 of 1880, addressed to the judge of the 25th District Court, the case pending before the Twenty-first District Court, is erroneously and improperly addressed, even though the judge of the Twenty-fifth District shall have been appointed, under recusation, to try the case. And an order of transfer signed under such an application by the judge of the Twenty-fifth District Court, and outside of the Twenty-first District, is null, and the whole proceeding is null.

Section 5 of Act No. 40 does not arbitrarily, on expiration of nine months, divest original court of jurisdiction when a case is progressing and in which many issues have been disposed of.

It does not require that the case shall have been finally tried within the nine months.

ON MOTION TO DISMISS APPEAL.

The opinion of the Court was delivered by

WATKINS, J. T. L. Broussard, one of defendants and appellees, moves to dismiss the plaintiff's appeal, for the reason that, since the death of the defendant U. A. Guilbeau, the *contestee* for the office in controversy, his daughter, Anita Guilbeau, one of his heirs, has not been legally cited as appellee, by means of citation to the surviving widow of the said deceased, and as tutrix of the children of their marriage—as said Anita was united in marriage with Charles Delacroix on the 14th of January, 1886, antecedent to plaintiff's petition for appeal

on the 7th of May, 1876; and he charges this neglect to have been the plaintiff's fault.

The citation of this heir, in our opinion, was an unnecessary formality, because she was not a necessary party to the appeal.

The *gravamen* of the dispute is the election *vel non* of plaintiff, to the office of sheriff of the parish of St. Martin in 1884. The heirs of defendant certainly acquired, by their ancestor's death, no right to the office in controversy—whatever may be said with regard to the fees and emoluments thereof, an office is not a heritable right or property.

The defendant and appellee, T. L. Broussard, holds and claims the right to exercise the functions of sheriff, by virtue of an appointment of the Governor to fill a vacancy therein, which was occasioned by the death of the contestee, U. A. Guilbeau, who was theretofore returned elected.

He was duly cited and we think properly. In fact, he was a party to a previous appeal in this case—37 Ann. 710, Halphen vs. Guilbeau and Broussard.

Motion overruled.

ON THE MERITS.

The origin and facts of this case are succinctly and fully stated in our previous opinion in 37 Ann. 710, Oscar Halphen vs. U. A. Guilbeau and T. L. Broussard, which was a suit to have reconstructed and reinstated the lost records therein, which right was recognized.

At the November term, 1884, Fred Gates, Judge of the Twenty-first Judicial District, on the suggestion of counsel for T. L. Broussard, entered an order of recusation and selected and designated Conrad DeBaillon, Judge of the Twenty-fifth Judicial District to try the same; and on the 4th of December, 1884, he was called upon to preside and proceeded with the trial thereof, and certain exceptions were filed. While same were under consideration, the court was adjourned from day to day upon the order of Judge Gates, so as not to interfere.

Thereafter various proceedings were taken in the suit—too numerous and conflicting for particular detail—which culminated in the dismissal of plaintiff's suit, and the said appeal in February, 1885, was the sequel.

Subsequent to the decision of the issues raised in that appeal plaintiff, through counsel, applied for and obtained an order to be signed by C. DeBaillon, Judge of the Twenty-fifth Judicial District "at chambers at Lafayette, La., this 3d of September, A. D. 1885," to the effect that, as nine months had elapsed since said suit was assigned to him for trial,

that same "be and the same is hereby transferred to the Thirteenth Judicial District Court in and for the parish of St. Landry, the judge of which court is competent to try the same."

In State ex rel. Fontelieu vs. Conrad DeBaillon, Judge, etc., 37 Ann. 392, this Court said: "Under Act No. 40 of 1880, which regulates the manner of trying recused cases, the recused judge is stripped of all control over the case, which is *transferred, in its entirety,* to the judge selected to try the same.

"If nine months elapse after recusation without a trial, *the cause must then be transferred to the district court of the nearest parish of an adjoining district,* the judge of which is competent to try the cause.

The order *must emanate from the judge first appointed to try the case, who alone has the legal authority to make the same.*"

In State ex rel Gates vs. Beattie, Judge, 38 Ann. ——, unreported, this Court recently held: "In case of such transfer of the suit, the judge of the court to which the transfer is made, has as full and complete authority and jurisdiction over the same as if it had originated in that jurisdiction."

The order transferring the case in this instance, did not emanate from the judge first appointed to try the case. It is perfectly true that Conrad DeBaillon, Judge of the Twenty-fifth Judicial District, had been called by Judge Gates to go into the Twenty-first Judicial District and trythe case. This he did. In so doing, it was by virtue of his authority to exercise the duties and perform the functions of judge *in that court.* While he thus exercised them, the judge of that district was *functus officio* for the time being. This is fully illustrated by the fact that during the time Judge DeBaillon was engaged in the trial of the case, Judge Gates ceased to perform the functions of his office. The order purporting to transfer this cause from the parish of St. Martin, in the Twenty-first Judicial District, to the parish of St. Landry, in the Thirteenth Judicial District, executed by Conrad DeBaillon, Judge of the Twenty-fifth Judicial District, at his chambers, in Lafayette, La., was an absolute nullity, and wholly without any effect in law, and did not operate the transfer of the suit thereto, and the judge of the Thirteenth Judicial District was and is wholly without jurisdiction or authority over said cause, it never having been transferred from the parish of St. Martin, where it was filed.

Judgment affirmed.

No. 1274.

SUCCESSION OF EUGENE BREAUX—OPPOSITION TO TABLEAU AND ACCOUNT BY URANIE PELLETIER.

1. The dowry is given to the husband for him to *enjoy* the same so long as the marriage shall last. R. C. C. 2347.
   With respect to the effects of the dowry, the *husband* is subject to all the obligations of the usufructuary. R. C. C. 2365, 549, 594.
   If the dowry consist of immovables, or of *movables not valued by the marriage contract*, the husband or his heirs may be compelled to restore the same at the dissolution of the marriage. R. C. C, 2367.
2. At the dissolution of the marriage all effects which both husband and wife reciprocally possess, are *presumed* common effects, or gains, unless it be satisfactorily shown which of such effects they brought in marriage or which have been given them separately, or which they have respectively inherited.
3. In order to charge the community for separate account of the *husband*, the proof must show, with reasonable certainty, that his property, or money, has been used for the benefit of the community.

APPEAL from the Twenty-first District Court, Parish of St. Martin. *Gates*, J.

C. H. Mouton for Opponent and Appellee.

Felix Voorhies and *Mouton & Martin* for the Administrator, Appellant.

The opinion of the Court was delivered by

WATKINS, J. Uranie Pelletier, the opponent, and Eugene Breaux, deceased, were married on the 20th of June, 1854. There was a marriage contract between the spouses, but it contained no stipulation that there should exist no community between them.

No children were born of their marriage. Uranie Pelletier survived the husband. At the date of Eugene Breaux's marriage with opponent, he had nine children, born of a former marriage with Josephine Beguenand, and to whom he was indebted in the sum of $1307.13, and which sum he paid them respectively, as they arrived at their majority, and during the existence of the community.

The opponent, Uranie Pelletier, accepted the community with benfit of inventory.

In the tableau of distribution and classification of the estate of Eug. Breaux, the administrator shows the active mass to be$5508.95; but also shows that same is in part composed of property belonging to the community, existing between deceased and opponent, and alleges the necessity of same being kept separate, with their charges respectively, in order that a fair distribution be made.

He then makes a statement of what the community is composed, viz:

Cash on hand.....$ 890 00

Succession of Breaux.

Ledoux's note	200 25
Numa Patin's note	140 00
Land, No. 6 of tableau	910 00
Cotton in seed (sold)	18 24
Corn in seed (sold)	70 00
Total community assets	$2,228 49

Of this, one-half belongs to opponent, add the other to the heirs of the deceased—he having died intestate—"after deduction is made of its debts and liabilities" and which are enumerated as follows, viz:

1st. One-half of the law-charges and costs incurred in the settlement of the estate of deceased.

2d. One-half of the claims of the spouses against the community. These are designated as follows, after deducting costs ..... $ 148 80

I.

Amount as per marriage contract 125 00

II.

"The personal property of Eugene Breaux, as per marriage contract above mentioned, consisted in part of horned cattle, horses, etc., which have been disposed of for the use and benefit of the community 850 00

III.

"Negro James mentioned in said marriage contract, was sold during their marriage, and shortly before the war * * This amount was employed for the benefit of the community to meet its liabilities and charges, during the four years the war lasted 1200 00

IV.

"Money loaned by deceased to Widow Rosemond Pelletier and subsequently collected through sale of land to St. Pé, and which forms part of cash inventoried, and the mortgage note of Numa Patie represents the balance. That amount enured to the benefit of the community, and the estate is its creditor for 1000 00

V.

"The estate is also a creditor of the community for a sum by deceased collected from the estate of his first wife, and employed for the benefit of the community 2250 00

"Claims of spouses against the community aggregating 5425 00

"Of this, the individual claims of Eugene Breaux against the community aggregate 5300 00

"The debts and charges *absorbing* the whole of the community * * and after deducting costs and the privilege claims, * * the balance of that community, *i. e.*, $954, goes to the estate of Eugene Breaux, to be added to the active mass of that estate, etc."

Uranie Pelletier opposed this tableau and classification on the following grounds, substantially, viz:

That, in addition to the sum the deceased used of the community funds, with which to make settlements with his children by a previous marriage, $1307.13, the active mass of the community is incorrectly stated to be $2228.40, and that same should be increased by the preceding sum of $1307.13; and that there was sufficient money on hand at the death of deceased to have paid "all legitimate debts due by the community."

She specially opposes the items carried on said tableau as claims of deceased, against the community, as illegal, viz:

The items of $850, $100, $1200, $2250, $5300.

Respondent and opponent specially denies that any of these items are debts or charges due by the community and prays for the rejection and disallowance of all of same and that the administrator be charged with the specified sum of $1307.13, and they be decreed the owners of one undivided one-half of the land described in item No. 6 on the tableau, and appraised as No 2 in the inventory of the deceased.

II.

The testimony shows that the plantation of Eugene Breaux was in a better condition in 1854, when he married Uranie Pelletier, than when he died in 1882. At that time he had a number of cattle, horses and mares, also three or four yoke of oxen and about fifty sheep. Some of the witnesses state that the plantation and improvements had diminished in value, at least one-fourth, between the date of the marriage in 1854, and his death in 1882—a period of about thirty-two years.

Michel Breaux, a son of the deceased, who states his age to be twenty-seven years, says that the sheep were sold to Valery Ledoux; that he delivered six cows to Arthur Patin, the agent of Uranie Pelletier, the opponent, to replace the cattle that she brought in marriage.

He further states that his father paid every one of the heirs—children of a former marriage—the amount coming to them, but he fails to state the source from which he derived the means—presumably from the community, of which he was the head and master.

Uranie Pelletier was one of the heirs of Henrietta Breaux, widow of Jean Pelletier. None of the lands inventoried in the succession of

Eugene Breaux have been sold. The opponent in an authentic act, formally accepted the community with the benefit of inventory.

Aside from certain documentary evidence, this is in substance the whole of the administrator's evidence in support of his tableau, and classification of the debts and charges against the community above enumerated.

From the homologated settlement made, in 1858, of the proceeds of the sale of the estate of Henrietta Breaux, widow of Jean Pelletier, it appears that opponent, as an heir, applied her interest, as an heir, to the payment of "several purchases made by her husband * * as appears by the *proces verbal of sale*, $1209.81.

Her share being, as above stated, $1158.35¾, leaving a balance in favor of the succession of $51.45¾.

III.

The judge *a quo* held that all the items enumerated in the tableau as community, properly belonged to it, but omitted any discussion in regard to the item No. 6, same being land valued at $910, inasmuch as the same remained unsold. He treated the proceeds of the sale of movables made on the 1st of February, 1883, in the absence of countervailing proof, as assets of the community, $1223.95.

He also held the sum paid by the deceased in settlement of the amounts coming to the children of his first marriage, was presumably paid with community funds, and he should be charged on his account with $1307.13.

Making total amount of the active mass of the community, not including the land remaining unsold	$3849.57
Less amount of community debts	273.80
Leaving net amount of community	3575.77
One-half to the widow	1787.88

The account admits that the land indicated upon it as item No. 6, and valued at $910, is an asset of the community, and one-half interest therein belongs to opponent.

The rehearsal of the evidence we have given above clearly shows that the separate rights and claims of the deceased, Eugene Breaux, against the community, are not supported by proof, and same must be rejected and disallowed.

For the sum of $1787.88, the court *a qua* gave opponent judgment against the estate of her deceased husband, as her undivided half interest in the community; and the further sum of $125 by her brought into the community at the time of her marriage. This should have

been deducted before division was made. He further ordered that the account filed by the administrator be rejected, and that he be ordered and required to file a new account in conformity with the particulars of said decree, and fully recognizing opponent's ownership of one undivided half interest in land mentioned on tableau as No. 6, and No. 2 on the inventory, and appeared at $910.

IV.

"At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are *presumed* common effects, or gains, unless it be *satisfactorily proved* which of said effects they brought in marriage, or which have been given them separately, or which they have respectively inherited." R. C. C. 2405.

Under the proof, indubitably the effects indicated are "common effects, or gains." There is no evidence in the record to establish the claims of deceased against the community. The administrator failed to trace the separate property into the *possession of the community*, or to show that same was sold, or disposed of for its use and benefit. 30 Ann. 275, Denegre vs. Denegre. Succession of Melany Foreman, 38 Ann. —, unreported, and decisions therein referred to; 36 Ann. 605; 10 R. 181.

Judgment affirmed.

No. 1270.

CHARLES CLERC VS. S. BOUDREAUX, MAYOR, AND BOARD OF TRUSTEES OF THE TOWN OF NEW IBERIA, AND FELIX MESTAYER, LESSEE.

(Consolidated with)

AUGUST PASCAL

VS.

S. BOUDREAUX, MAYOR, ET ALS.

A justice of the peace has no jurisdiction *ratione materiæ* to entertain a suit, in which damages actually suffered, amounting to $90 00, are demanded, and in which defendants are enjoined from claiming and collecting daily charges for the use of a market stall, and from closing same and keeping it closed, and from ever interfering with him in his business." 37 Ann. 583, State ex rel. New Orleans vs. Judge: 33 Ann. 146, State ex rel. Fredricks vs. Skinner.

APPEAL from the First Justice's Court, Sixth Ward, Parish of Iberia. *Duleus*, J.

Clerc vs. Boudreaux, Mayor.

E. Simon and *T. D. Foster* for Plaintiffs and Appellants:

1. Justices of the peace have jurisdiction in all matters except succession or probate matters, where the amount in dispute does not exceed one hundred dollars. See State Constitution, Art 125; Code of Practice, Art. 1064.
2. They have jurisdiction for sums of money, whether debts, taxes or fines, provided they do not exceed one hundred dollars. C. P. Arts. 1063-1064.
3. To determine jurisdiction *ratione materiæ*, the amount in dispute at the time the suit is filed must govern and control, and not future amounts that may or may not accrue. C. P. Arts. 87, 88, 91; State Const., Art. 125.

Courts cannot confer jurisdiction. C. P. Art. 92.

Breaux & Renoudet for Defendants and Appellees:

The plaintiffs pray to obtain a perpetual injunction to prevent the exercise of a right exceeding in value one hundred dollars. The State ex rel N. O. Gas Light Co. vs. Judge et al. 37 Ann. 583.

They desire to have a lease annulled—the rental is more than seventeen hundred dollars—and to prevent the lessee of the corporation of New Iberia from collecting more than one hundred dollars each month during the existence of the lease.

Plaintiffs do not allege that the specific rates and charges are not collectible for certain mentioned days, but they pray that the defendant corporation and others be forever enjoined from collecting any rates and charges during the extent of the lease. The lease attacked commences on 1st September, 1885, and will end August 31, 1886.

The plaintiffs seek the Court's sanction not to pay these charges and thus to enable them to carry on business, paying more than one hundred dollars each month, without paying any charges or dues to the corporation.

They—if defendant's position be correct—have no right to carry on business without paying a license, hence the question of carrying on business is involved.

Plaintiffs each claim ninety dollars. They put at issue the validity of the town charter and of the ordinances, and the right of the corporation to collect certain dues.

In all these matters at issue the court *a qua* is without jurisdiction *ratione materiæ*.

The opinion of the Court was delivered by

WATKINS, J. The cases are consolidated, and the plaintiffs' appeal from the judgment of the justice of the peace maintaining the exception of no jurisdiction *ratione materiæ* filed by the defendant.

Plaintiff enjoined the town corporation of New Iberia, and Felix Mestayer, lessee, from collecting a daily charge or tariff imposed upon them as butchers, and also from closing up their places of business, on the ground that the ordinance adopted August 10, 1885, under which the daily charge and tariff was imposed, was unconstitutional and illegal.

I.

The only question to be considered in determining the jurisdiction of the justice of the peace is "the amount in dispute." Does the "amount in dispute * * exceed one hundred dollars, exclusive of interest?" Const. Art. 125.

The plaintiff, Clerc, alleges in his petition that he, as the keeper of

a private market in the town of New Iberia, was required by the defendants to pay "certain charges on his business to the amount of twenty-five cents daily, for his stall * * sixty cents and other charges daily for every slaughtered animal which he has for sale, etc.," or upon his refusal so to do, his place of business was closed up without warrant of law.

He further alleges that "the *action* of said parties is unconstitutional and illegal * * and by said illegal acts referred to he *has been* damaged in the sum of $90 * * * and that they will *daily enforce* the pretended and illegal ordinance of the board of trustees, and that he will suffer an irreparable injury thereby unless restrained and enjoined * * from interfering with his business."

He prays an injunction against the mayor and lessee restraining them "and all other agents acting under them, from demanding and collecting *daily* the said pretended and illegal charges and taxes, and from closing and keeping closed his above mentioned premises, and from *ever interfering* with him in his business *in anywise* * * and that they be condemned to pay *in solido* the amount of $90, etc."

Felix Mestayer, one of defendants, sets forth that he has "leased the market-house of the corporation of New Iberia, with the right to collect all rates, charges and tariffs annexed thereto, *as set forth in plaintiff's petition*, for twelve months, beginning on the 1st day of September, 1885, and ending 31st of August, 1886, for the price of $1,712 50, and particularly the right to collect the rates and charges mentioned from Charles Clerc, extending throughout the said lease," etc.

He avers that, though the specific rates and charges are to be collected daily, he is enjoined from collecting same during the whole extent of, and at any time during the said lease, and the amount involved largely exceeds one hundred dollars; that the monthly rent, or rate of said Charles Clerc, largely exceeds $100, and "the right to carry on said business without paying said license is involved;" and plaintiff also claims $90 actually sustained.

He excepts that the justice of the peace was without jurisdiction *ratione materiæ* to try this cause.

This suit was filed on the 1st of September, 1885, at the incipiency of the lease.

The case of Pascal vs. same defendant, involves the same issues.

On the trial one witness testifies that he keeps a butcher's stall in the New Iberia market-house, and that his "business exceeds $100 per month; it amounts to $8 or $9 per day—gross sales," though he does not know the amount of the business of Charles Clerc.

The plaintiff, Aug. Pascal, as a witness, states that he kept a stall outside of the market-house, and his daily sales of meat amounted to about $6, and exceeded $100 per month.

Felix Mestayer testified that Mr. Charles Clerc's business is larger than that of J. Courrigé's and August Pascal's.

The plaintiff, in each of these consolidated suits, enjoins the defendants from demanding and collecting the daily rates and charges for the use of market stalls, and from closing same and keeping same closed, and "from *ever* interfering with him in his business, in anywise, and demands the sum of $90 damages actually sustained.

The judgment of the court appealed from, dismissing the two suits for want of jurisdiction *ratione materiæ*, was unquestionably correct, and it is therefore affirmed, the plaintiff and appellant to pay cost of both courts.